INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provision believed to sustain jurisdiction	2
Statute of the State, the validity of which is involved	2
Date of the judgment or decree	5
Nature of the case and rulings of the court bringing the case within the jurisdictional provisions relied upon	5
Grounds upon which it is contended the questions involved are substantial	7
Cases believed to sustain jurisdiction	8
Matters in which the specially constituted District Court of the United States abused its discretion in failing to grant an interlocutory injunction	9
Appendix "A"—Article V, Sec. 1, par. II, III, and IV of the Constitution of Georgia	11
Appendix "B"—Act of the General Assembly of Georgia, approved March 20, 1943	12
Appendix "C"—Act of the General Assembly of Georgia, approved January 7, 1944	12
Appendix "D"—Act of the General Assembly of Georgia, approved February 1, 1946	13
Appendix "E"—Decree and opinion of the District Court	16

Table of Cases Cited

Colegrove v. *Green*, 90 L. Ed. 1242	8
Nixon v. *Herndon*, 273 U. S. 536	8
Seibold, Ex parte, 100 U. S. 371	8
Snowden v. *Hughes*, 321 U. S. 1, 88 L. Ed. 497	8
Stratton v. *St. Louis Southwestern Railway Co.*, 282 U. S. 10, 75 L. Ed. 135	8
U. S. v. *Classic*, 313 U. S. 299, 85 L. Ed. 1377	8
Wiley v. *Sinkler*, 179 U. S. 58	4

Statutes Cited

	Page
Act of the General Assembly of Georgia, approved March 20, 1943 (Georgia Laws 1943, pp. 347-348, Sec. 1)	4
Act of the General Assembly of Georgia, approved January 7, 1944 (Georgia Laws 1944, Ex. Session)	5
Act of the General Assembly of Georgia, approved February 1, 1946 (Act 632, Georgia Laws 1946)	6
Civil Rights Act (8 U. S. C. A. 43)	2
Code of Georgia of 1933 (Annotated), Book 12, Part VI, Chapter 34-32 (pages 91 through 99), Sections 34-3212 through 34-3218 (pages 95 through 99) (Georgia Laws, 1917, pages 183-189. Section 34-3212 at page 96, Book 12)	4
Constitution of Georgia, Article V, Sec. 1, par. II, III and IV	5
Constitution of the United States, 14th Amendment	
Judicial Code, Sections 238 and 266, as amended by the Acts of February 13, 1925, c. 299, Sec. 1 (43 Stat. 938) (28 U. S. C. A., Sections 345 and 380)	2, 6, 7

BLEED THROUGH- POOR COPY

Page

4

5

6
2

4

5

6, 7

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 3013

MRS. ROBERT LEE TURMAN AND CULLEN B. GOSNELL,

Plaintiffs,

vs.

J. LON DUCKWORTH, AS CHAIRMAN OF THE GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE: MISS GRACE CANNINGTON, AS SECRETARY GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE; THE STATE DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA; BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA,

Defendants

STATEMENT AS TO JURISDICTION

Pursuant to the provisions of Rule 12 of the Supreme Court of the United States, the above named complainants and appellants file this their separate statement particularly disclosing the basis upon which they contend the Supreme Court of the United States has jurisdiction upon appeal to review the order or decree here appealed from which was entered in the District Court of the United States for the Northern District of Georgia by a statutory court

consisting of Judge Samuel H. Sibley, Circuit Judge, Louie W. Strum and Frank M. Scarlett, District Judges specially convoked under and by virtue of the provisions of Sec. 266 of the Judicial Code (28 U. S. C. A., Sec. 380); as follows:

(a)

Statutory Provision Believed to Sustain Jurisdiction

The jurisdiction of the Surpeme Court of the United States upon appeal is invoked under Sections 238 and 266 of the Judicial Code as amended by the Acts of Feb. 13, 1925, c. 299, Sec. 1 (43 Stat. 938) (U. S. C. A. Title 28, Sections 345 and 380).

(b)

Statute of the State, the Validity of Which Is Involved

The statute of the State of Georgia, the validity of which is involved, and which is attacked directly as being contrary to the Constitution of the United States, will be found in the Code of Georgia of 1933 (Annotated), Book 12, Part VI, Chapter 34-32, (pages 91 through 99), and more especially Sections 34-3212 through 34-3218 (pages 95 through 99), the latter Sections as originally enacted, being found in Georgia Laws, 1917, pages 183-189. Sec. 34-3212, at page 96, Book 12 of said Code, which is the portion of said Act material to this case, is as follows:

> "Whenever any political party shall hold primary elections for nomination of candidates for United States Senator, Governor, Statehouse officers, Justices of the Supreme Court, and Judges of the Court of Appeals, such party or its authorities shall cause all candidates for nominations for said offices to be voted for on one and the same day throughout the State, which is hereby fixed as the second Wednesday in September of each year in which there is a regular general

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election. Candidates for nominations to the above-named offices who receive, respectively, the highest number of popular votes in any given county shall be considered to have carried such county, and shall be entitled to the full vote of such county on the county unit basis, that is to say, two votes for each representative to which such county is entitled in the lower House of the General Assembly. If in any county any two or more candidates shall tie for the highest number of popular votes received, the county unit vote of such county shall be equally divided between the candidates so tying. All such county unit votes shall within 10 days after such primary be accurately consolidated by the chairman and secretary of the State committee of the political party holding such primary, and published in a newspaper published at the Capital, within three days after the completion of the consolidation, certified under the hands and seals of said chairman and secretary; and the candidates for said offices, respectively, who shall receive a majority of all the county unit votes, throughout the entire state, upon the basis above set forth, shall be declared by the State convention of the party holding such primary, or the permanent chairman thereof, or other party authority, without the necessity of a formal ballot, to be the nominees of such party for the above-named offices, respectively, and it shall be the duty of the State executive committee elected or appointed at such convention, or by its authority, or the chairman or secretary thereof, or other authority of such party, to see to it that the names of all such successful candidates shall be placed upon the tickets or ballots of such party at the general election following such primary, and such successful candidates shall be considered, deemed and held as the duly nominated candidates of such party for the offices named: Provided, that in the event there are only two candidates for any particular office referred to in this section, and it shall appear, after the consolidation of all of the county unit votes throughout the State, that said candidates have received an equal number of county unit votes, the one who shall have

received a majority of the popular votes shall be declared by the State Convention of the party holding such primary, or the permanent chairman thereof, or other party authority, without the necessity of a formal ballot, to be the nominee of such party for such office; and it shall be the duty of the State executive committee elected or appointed at such convention, or by its authority, or the chairman or secretary thereof, or other authority of such party, to see to it that the name of such successful candidate shall be placed upon the tickets or ballots of such party at the general election following such primary, and such successful candidate shall be considered, deemed and held as the duly nominated candidate of such party for the office named: Provided, further, that if no convention of such party shall be called or held, the declaration of the result shall be made in such manner as may be prescribed by the State Committee or other authority of such party." (Acts 1917, pp. 183-184.)

To be considered in connection with the relief sought are the following statutes and provisions of the Constitution of Georgia, to-wit:

(1)

Art. V, Sec. 1, par. II, III, and IV of the Constitution of Georgia as adopted Aug. 7, 1945, copy of which is attached hereto as Appendix "A".

(2)

Act of the General Assembly of Georgia, approved Mar. 20, 1943 (Georgia Laws 1943, pp. 347-348, Sec. 1) material portions of which are attached hereto as Appendix "B".

(3)

Act of the General Assembly of Georgia, approved Jan. 7, 1944 (Georgia Laws 1944, Ex. Session pp. ——), commonly referred to as the "Soldier's Voting Law", the applicable portions of which are attached hereto as Appendix "C".

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(4)

Act of the General Assembly of Georgia, approved Feb. 1, 1946 (Act 632, Georgia Laws 1946, pp. ——), copy of which is attached hereto as Appendix "D".

(c)

Date of the Judgment or Decree

The date of the judgment or decree sought to be reviewed herein is August 24, 1946 and the date upon which the application for appeal is presented is September 13th 1946.

(d)

Nature of the Case and Rulings of the Court Bringing the Case Within the Jurisdictional Provisions Relied upon

The Constitution of Georgia contains no equal protection clause in the sense of Sec. 1 of the Fourteenth Amendment to the Constitution of the United States. The Constitution of Georgia does provede that the Governor shall be elected in a statewide election by a majority of the votes cast. Nomination in Democratic Primaries in Georgia is tantamount to election and has been historically so. The General Assembly of Georgia by an Act in 1917 entitled "Nominations by County Units" set up a system of nominations for Governor and other State officials by party primaries as a part of the State election system and required the result of such primary elections to be determined by a County unit plan. Under the County unit plan Fulton and DeKalb Counties, Georgia, with populations of 392,886 and 86,942 (Census of 1940) are each given six unit votes, while Quitman and Echols Counties with populations of 3,435 and 2,964 respectively are each given 2 unit votes. In the Democratic Primary of July 17, 1946, 84,50 ballots were cast in Fulton County while in Chattahoochee County (2 Unit

votes) only 265 ballots were cast. The foregoing instances are but illustrations of the system provided, the general pattern giving to individual votes in the smaller counties many times (in varying ratio) more value than the votes in the more populous counties.

Plaintiffs are respectively citizens and qualified voters of Fulton and DeKalb Counties, and voted in the Democratic Primary held July 17, 1946, casting their ballots for a candidate for nomination for Governor of Georgia who obtained the plurality of votes cast in the primary, but did not obtain the majority of the county unit votes required by the Act of 1917. Plaintiffs contend the Act of 1917 is an unreasonable discrimination against all voters residing in any but the smallest counties, said discrimination as to registered voters in Fulton County depreciating their votes to such an extent that it requires 106 plus votes in Fulton County to have the same value as 1 vote in Chattahoochee County.

Plaintiffs sought to have the Act of 1917 declared null and void, as contrary to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, sought relief under Civil Rights Act (Title 8 USCA Sec. 43), and further sought to have the Chairman and Secretary of the Georgia State Democratic Executive Committee and the Secretary of State enjoined from complying with the Act of 1917 and from certifying the results of the Primary held under it or of the General election in which only its nominees can under the facts alleged be candidates.

The District Judge ordered the petition filed, but refused a restraining order and summoned a Court of three judges to consider the grant of an interlocutory injunction pursuant to Sec. 266 of the Judicial Code, as amended by Act of Feb. 13, 1925, clause 299, Sec. 1 (USCA Title 28, Section 380).

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The cause came on for hearing before the three Judge Court on August 16, 1946. After hearing evidence and argument, the Court on August 24, 1946 rendered the following judgment or decree:

> "On August 16, 1946, the above stated case came on for a hearing for an interlocutory injunction before a court of three judges as by statute provided, Hon. Frank M. Scarlett, District Judge, presiding by designation in the Northern District of Georgia, having called to his assistance Hon. Samuel H. Sibley, Circuit Judge, and Hon. Louie W. Strum, District Judge of the Southern District of Florida. After hearing evidence and argument and taken time to consider, it is ordered and adjudged that because of the findings of fact and conclusions of law filed herewith, an interlocutory injunction be and the same is hereby denied."

The Court also made certain findings of fact and conclusions of law in connection with the entry of the above decree or judgment. Copies of these findings and conclusions are reproduced as an appendix "E", and attached to this jurisdictional statement.

The appeal prayed for is to the Supreme Court of the United States from the order or decree denying plaintiffs an interlocutory injunction and is provided for by Sec. 266, Judicial Code, as amended by the Act of Feb. 13, 1925, c. 299, Sec. 1 (43 Stat. 938) (Title 28 USCA, Sec. 380).

(e)

Grounds upon Which It Is Contended the Questions Involved Are Substantial

1. Under the Constitution of the State of Georgia the Plaintiffs, and each member of the class they represent, were all put upon equal basis without classification as to their right to vote, and have their ballot counted on an

equal basis with every other vote cast by a qualified elector throughout the State. This right the Legislature has sought to take away by destroying the full effectiveness of their votes. This action obviously deprives plaintiffs of the equal protection of the laws. The Fourteenth Amendment forbids such discrimination. It does not permit the States to pick out certain qualified citizens or groups of citizens and deny them the right to vote at all. Since there is no adequate remedy for depriving a citizen of his right to vote under a scheme which while permitting the vote to be cast, nevertheless, destroys its value by a required method of counting, equity can and should grant relief.

The Supreme Court of the United States has prevented discriminatory classification of voters and has forced unwilling parties, indeed unwilling States, to abandon classification, e. g., against color. The Act of 1917 which deprives plaintiffs of the full effectiveness of their votes by a classification based upon different locale of residence within the area presents equally as substantial a question, and is a proper concern of this Court.

(f)

Cases Believed to Sustain Jurisdiction

The following decisions of the Court are believed to sustain the jurisdiction of the Supreme Court of the United States on a direct appeal to review the judgment or decree here in question:

Stratton v. *St. Louis Southwestern Railway Co.*, 282 U. S. 10; 75 L. Ed. 135 (1930);
Nixon v. *Herndon*, 273 U. S. 536;
Snowden v. *Hughes*, 321 U. S. 1; 88 L. Ed. 497;
Ex parte Seibold, U. S. 371;
Filey v. *Sinkler*, 179 U. S. 58;
U. S. v. *Classic*, 313 U. S. 299; 85 L. Ed. 1[illegible]7.

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(g)

Matters in Which the Specially Constituted District Court of the United States Abused Its Discretion in Failing to Grant an Interlocutory Injunction.

(1) The Court refused to exercise its discretion, holding "whether it be that the subject matter is not of equitable cognizance, or merely that equity should withhold its hand, we think the decision in Colegrove *vs.* Green, 90 L. Ed. 1242, requires us to deny equitable relief."

The questions before the Court in this case and the *Colegrove* case are entirely different and the necessity for and results of injunctions in the two cases are likewise entirely different. In the pending case, election has been held and the votes have been counted. The method used violates the rights of the plaintiffs derived from the Constitution of Georgia, and denies them the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States. The Court was asked to enjoin further proceedings based on the unlawful method of evaluation of plaintiffs' votes. Plaintiffs' challenge to this method of counting ballots was timely, and adequate relief could be had in no other manner and at no other time. The *Colegrove* case is in no respect authority for holding to the contrary. It was not a conclusive determination of any question made in the present case. The Appellants contend that the trial court should have exercised its own discretion as applicable to the facts before it rather than being coerced by a misconception as to the binding effect of a Supreme Court decision which is readily distinguished both in its facts and in the effect of an injunction.

(2) The refusal of the Court to exercise its sound discretion, appellants contend, amounted in law to an abuse of discretion.

(3) If it can be said that the District Court exercised its discretion in denying the interlocutory injunction prayed upon the authority of *Colegrove* vs. *Green, supra,* said Court abused its discretion, for, as appellants contend, the majority judgment in the case of *Colegrove* vs. *Green, supra,* shows upon its face that the judgment of the majority (there being no majority opinion) rested upon reasons not germane to the issues in this case.

Respectfully submitted,

CHARLES S. REID,
MARSHALL L. ALLISON,
HAROLD T. PATTERSON,
WILLIAM F. LOZIER,
JOHN L. TYE,
WILLIAM D. THOMSON,
Counsel for Appellants.

Dated this 13th day of September, 1946.

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APPENDIX "A"

"*Election for Governor.* The first election for Governor, under this Constitution, shall be held on Tuesday after the first Monday in November of 1946, and the Governor-elect shall be installed in office at the next session of the General Assembly. An election shall take place quadrennially thereafter, on said date, until another date be fixed by the General Assembly. Said election shall be held at the places of holding general elections in the several counties of this State, in the manner prescribed for the election of members of the General Assembly, and the electors shall be the same." Article V, Section 1, Para. II, Constitution of the State of Georgia (as adopted in 1945).

"*Returns of elections.* The returns for every election of Governor shall be sealed up by the managers, separately from other returns, and directed to the President of the Senate and Speaker of the House of Representatives, and transmitted to the Secretary of State, who shall, without opening said returns, cause the same to be laid before the Senate on the day after the two houses shall have been organized, and they shall be transmitted by the Senate to the House of Representatives." Article V, Section 1, Para. III, Constitution of the State of Georgia (as adopted in 1945).

"*How returns published.* The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; but, if no person shall have such majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice." Article V, Section 1, Para. IV Constitution of the State of Georgia (as adopted in 1945).

APPENDIX "B"

Section 34-3215a of the Supplement to the Annotated Code of Georgia, codified from Ga. Laws 1943, page 347, reads as follows:

"Immediately after the consolidation of the votes in any such primary election a certificate, showing the names of such candidates and the offices for which they are candidates, shall be filed in the office of the Secretary of State of this State; such certificate to be signed by the chairman and secretary of the State Committee of the political party holding such primary. Said certificate shall show by counties the total number of popular votes and the county unit votes received by each candidate in any such primary election. (Acts 1943, p. 347.)"

APPENDIX "C"

Sections 8 and 10 of an act of the General Assembly of Georgia, approved January 7, 1944 (Ga. Laws 1944, Ex. Sess. pp. 4-5) commonly referred to as the soldier's voting law read:

Sec. 8: "In order to allow more adequate time for the participation of members of the military in elections and party primaries, the following provisions are enacted in lieu of those now provided by law:

1. All candidates for national and state offices, or the proper authorities of the political party nominating them, shall file notice of their candidacy, giving their names and the offices for which they are candidates, with the Secretary of State, at least ninety days prior to the regular election. All candidates for district and county offices either by themselves or by the proper authorities of the party nominating them, shall file notice of their candidacy with the Ordinary of the County at least ninety days before the regular election.

2. Whenever any political party shall hold primary elections for nomination of candidates for office for Governor, State House Officers, Members of Congress,

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United States Senators, Judges of the Superior Courts, Justices of the Supreme Court, Judges of the Court of Appeals, Solicitors General, and Members of the General Assembly, which are by law voted on one and the same day throughout the State, said primary may be held on such date as may be fixed by the State Executive Committee of such party, and the State Executive Committee is authorized to fix such time for the said primary, second primary, or party convention as it may determine without respect to the time now provided by law as the date on which the said primary, second primary, or convention shall be held."

Sec. 10: "The Governor shall furnish the several Ordinaries all blank forms necessary for the general elections in sufficient time for the ordinaries to have the ballots printed at least seventy days before election day."

APPENDIX "D"

Senate Bill 142. Act No. 632

Approved Feb. 1, 1946

AN ACT

"To repeal Chapter 34-14, Section 34-1401, Section 34-1402 and Section 34-1403, relating to blank forms, tally sheets and blank lists of voters, and certificates used in the holding of elections in their entirety, and to repeal paragraph 7 of Section 40-601 of the Code of Georgia of 1933, relating to the duties of the Secretary of State as to furnishing forms of returns, certificates, directions and advice to the Ordinaries with reference to holding elections and for other purposes; and substitute for said paragraph 7 a new paragraph prescribing the duties of the Secretary of State with reference to furnishing all necessary forms for holding elections, and to enact a new paragraph to be known as paragraph 1a and 7b, and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1

That Chapter 34-1401, 34-1402 and 34-1403 of the Code of Georgia of 1933 prescribing certain duties upon the Governor relating to the furnishing of certain blank forms, tally sheets and blank lists of voters and certificates used in the holding of elections be and the same are hereby repealed in their entirety.

Section 2

That paragraph 7 of Section 40-601 of the Code of Georgia, relating to the duties of the Secretary of State as to furnishing forms of returns, certificates, directions and advice to the Ordinaries with reference to holding elections and for other purposes, be and the same is hereby repealed in its entirety.

Section 3

That in lieu of paragraph 7 of said Section 40-601 of the Code of Georgia of 1933 a new paragraph to be known as paragraph 7 is hereby enacted to read as follows: "The Secretary of State shall furnish each Ordinary of the State the Form of official ballot, all blank forms, including tally sheets, blank lists of voters, forms of returns, certificates and directions to be used in all elections for United States Senate, Governor, Electors of President and Vice-President of the United States, Representatives to Congress, Secretary of State, State Treasurer, Comptroller General, Attorney General, State Superintendent of Schools, Supreme Court of Appeals, Judges of the Superior Court Solicitor General, Public Service Commission, Commissioner of Labor, Members of the General Assembly, and County Officers. The Secretary of State shall certify to the respective Ordinaries the names of all candidates for national and state offices who have qualified as such as provided in Section 34-1904 of the Code of Georgia and in case there are one or more persons purporting to represent the same political party or candidate it shall be the duty

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of the Secretary of State to determine such an issue. The Ordinaries of the respective counties shall not be required to add any other names for national and state officers on the official ballot except upon certificate of the Secretary of State.

7A. In any party polling less than 150,000 votes in Georgia in the last preceding general election for President of the United States, where contest exists as to the legal Delegates to a National Convention at which a nomination of candidate for the President of the United States is to be made, it shall be the duty of the Secretary of State to determine the issue and to certify the names of the legally elected delegates to the Secretary of the National Committee of the Party interested.

7B. The Secretary of State shall provide and keep on hand a sufficient quantity of self sealing envelopes of uniform appearance and suitable size, and a sufficient quantity of any of the forms above specified for use in the elections aforesaid. He shall furnish the respective Ordinaries all of such forms as may be necessary, and they shall furnish all such forms as may be necessary to the Justices of the Peace at least five days before election day, and on failure to do so the Ordinaries shall be subject to a fine not exceeding $100.00.

Section 4

All laws and parts of laws in conflict herewith be and the same are hereby repealed."

APPENDIX "E"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISON

CIVIL ACTION No. 3013

MRS. ROBERT LEE TURMAN AND CULLEN B. GOSNELL, Plaintiffs,

vs.

J. LON DUCKWORTH, as Chairman Georgia State Democratic Executive Committee; MISS GRACE CANNINGTON, as Secretary Georgia State Democratic Executive Committee; THE STATE DEMOCRATIC EXECUTIVE COMMITTEE of the State of Georgia; BEN W. FORTSON, JR., as Secretary of State of Georgia, Defendants

On August 16, 1946, the above stated case came on for a hearing for an interlocutory injunction before a court of three judges as by statute provided, Hon. Frank M. Scarlett, District Judge, presiding by designation in the Northern District of Georgia, having called to his assistance Hon. Samuel H. Sibley, Circuit Judge, and Hon. Louie W. Strum, District Judge of the Southern District of Florida. After hearing evidence and argument and taken time to consider, it is ordered and adjudged that because of the findings of fact and conclusions of law filed herewith, an interlocutory injunction be and the same is hereby denied.

This August 24, 1946.

(S.) SAMUEL H. SIBLEY,
United States Circuit Judge.
(S.) LOUIE W. STRUM,
United States District Judge.
(S) F. M. SCARLETT
United States District Judge.

Filed in Clerk's Office,
Aug. 26, 1946.
F. L. Beers, Clerk,
By C. A. McGrew, Deputy Clerk.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

CIVIL ACTION No. 3013

MRS. ROBERT LEE TURMAN AND CULLEN B. GOSNELL, Plaintiffs,

vs.

J. LON DUCKWORTH, as Chairman Georgia State Democratic Executive Committee; MISS GRACE CANNINGTON, as Secretary Georgia State Democratic Executive Committee; THE STATE DEMOCRATIC EXECUTIVE COMMITTEE of the State of Georgia; BEN W. FORTSON, JR., as Secretary of State of Georgia, Defendants

The petition, brought in behalf of plaintiffs and others similarly situated, alleges that they are respectively citizens and registered qualified voters of Fulton and DeKalb Counties, Georgia, and voted in the Democratic primary held July 17, 1946, casting their votes for a candidate for nomination for Governor of Georgia who obtained the plurality of votes cast in the primary, but did not obtain the majority of county unit votes required by the Georgia statutes relating to statewide primaries, Georgia Code of 1933, Sect. 34-3212, and Georgia laws of 1943, p. 347; that the Chairman and Secretary of the State Democratic Committee intended to certify to the Secretary of State as the nominee, pursuant to the last cited statute, the candidate having the majority of county unit votes, and the Secretary of State would place such nominee on the official ballots furnished by the State for use in the general election in November, 1946, unless enjoined by the court, to the irreparable damage of petitioners, they having no remedy unless in equity. The contention set up is that the portions of the Statute which make the majority of the county units to control the result rather than the plurality or majority of all ballots cast in the election discriminate, contrary to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, against

the voters in such counties as Fulton and DeKalb, which have a voting strength far in excess of the county unit votes allowed them, as compared with smaller counties; and that the nomination of a candidate for Governor ought to follow the rule of the final election, by which, as provided in the State Constitution, the number of votes cast throughout the State controls. The relief originally prayed was that the county unit rule provided by the statute be declared null and void, and that the Democratic Executive Committee and its Chairman and Secretary and the Secretary of State be enjoined from complying with such statute.

The District Judge ordered the pentition filed but refused a restraining order, and summoned a court of three judges to consider the grant of an interlocutory injunction. Before that court an amendment of the petition was made to allege that since the filing of the petition the time had expired within which candidates could under the State laws qualify as such and have their names entered on the official ballots, so that if the candidate having the majority of the county unit votes has been certified to the Secretary of State his name alone would appear on the official ballot as a Democratic candidate, and in that event it was prayed that the Secretary of State be enjoined from causing the returns from the general election to be laid before the General Assembly for a declaration of the result of the gubernatorial election.

The Secretary of State moved that he be dismissed as a defendant because the suit against him as a State official was in effect against the State itself, and the State has not consented to be sued, and because no claim was stated against him on which relief can be granted.

The other defendants also moved a dismissal as to themselves.

The answer for all defendants, filed subject to the motions to dismiss, asserted that if the things complained of are wrong, the remedy is not in a court of equity, but in the legislative and political department of the State government; that plaintiffs voted in the primary, in which the county unit rule for declaring the result was not only fixed by law, but also by the rules of the State Democratic

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Executive Committee promulgated for this primary, and thereby plaintiffs agreed to such rule, and became estopped to question its application after their candidate failed to win under it; that plaintiffs delayed to object till four days before the time limit for candidates to qualify, and that such delay constitutes laches, which bars equitable relief; that one day before the final date for qualifying candidates, Aug. 6, 1946, the Chairman and Secretary of the Executive Committee did certify to the Secretary of State as the Democratic nominee the candidate having the majority of the county unit votes, and the Secretary of State did (on August 12 as was testified) make up the forms for the official election ballot and did send them out to the Ordinary of each County to be printed as required by law, so that the matter has become moot. The answer substantially admitted the facts alleged in the petition, denying the legal conclusions.

Findings of Fact

The facts are as above set out. In addition the printed rules of the Democratic Executive Committee governing the Democratic primary called for July 17, 1946, were introduced; Rule VI, providing: "Candidates for Governor, State House Officers, including Justices of the Supreme Court and Judges of the Court of Appeals, who receive respectively the highest number of votes in each County shall be considered to have carried that County and entitled to the full vote of such County on the county unit basis, as provided by law . . ." An exhibit to the petition showing the tabulated vote by Counties was neither admitted nor denied by the answer, but was treated as correct in the hearing and we find it to be substantially correct. It shows a total Democratic vote in DeKalb County of 26,770, and in Fulton County of 84,550, each County having six unit votes. Other 6-unit counties cast a vote ranging from Chatham, 39,595, down to Floyd, 11,167. The four-unit counties cast a vote between 10,000 and 5,000. The two-unit counties in general voted less than 5,000; Chattahoochee County only 265, and several others 500 to 600 votes. As facts of common knowledge of which it was conceded

the court can take judicial notice, it is further stated that the population of Fulton and DeKalb Counties, which are contiguous, is rapidly increasing; that Fulton has in recent years absorbed two contiguous counties, Milton and Campbell, by a popular vote as provided in the then Constitution, though not gaining thereby additional representatives in the Legislature, or county unit votes in statewide primaries. Chattahoochee County has had about half its territory taken by the United States and incorporated in Fort Benning.

As background for county units in State political organizations, these general facts are true: The early Constitutions of Georgia not only recognized them in choosing legislators, but also in choosing the Governor. Since 1823, however, the Governor has been chosen by statewide vote. The legislators are still chosen by Counties and a few of the larger Counties have continuously been given additional members in the House of Representatives. Since 1868 the Counties have been by the Constitutions put into three classes, to be reascertained after each decennial census, a fixed number of the most populous being entitled each to three representatives, a fixed number of the next most populous having each two representatives, and the remaining counties having one each. Not only in Georgia, but throughout the United States, the great political parties have regarded county representation in nominating their candidates. Originally, when travel was difficult, the members of the Legislatures themselves assembled in a party caucus and recommended candidates. After 1930 the convention system became prevalent, each County sending delegates generally equal to twice the number of their Representatives. About 1903, the system of party primaries became prevalent, and they were in most States regulated by law. See Introduction to American Government, by Ogg & Ray, pp. 848 to 850. In Georgia primaries were regulated by law to some extent in 1890, but the regulation now in controversy was not made till 1917. But the county unit rule was steadily observed, both in party conventions and primaries, except that in 1906, when Governor Hoke Smith, of Fulton County, was in party leadership that rule was abolished. The abolition was made an issue in the next primary

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nomination for governor, and Governor Smith was defeated on a popular vote basis, and the county unit rule reinstated, and has so remained. (See statement of C. E. Gregory, exhibited in Cook vs. Fortson, decided this day.) When in 1917 the Legislature came to regulate primaries more fully, in adopting the county unit rule it continued what was already in existence by the will of the political parties.

Conclusions of Law

On this hearing for interlocutory injunction we will not pass finally on the motions to dismiss. We consider them, however, on the general question of the grant of interlocutory relief. And we consider that this case is in its general aspects one of party politics, in which courts should not meddle unless the duty to do so is plain. We are of opinion that it would be going too far for a court of equity to undertake to prevent the Secretary of State from performing his functions under laws confessedly valid, or to interfere with his transmitting the returns of the general election to the Legislature. A better case for interfering with the application of the county unit rule by the Democratic Executive Committee would have been presented if the plaintiffs had promptly moved to assert its constitutional invalidity and to stop its application when the Executive Committee, which had the right to determine whether a primary or a convention should be held for nominations, did call the primary of July 17, and published the rules under which it should be conducted, including expressly the county unit rule. The candidates acepted that rule, and none of them is complaining of its application. These voters, voting without protest under it, do not stand well in a belated complaint made after it was too late to have another primary or even a convention nomination, the time for candidates in the general election to qualify being too close at hand.

We have not here a criminal statute about a political matter, as in Re Yarbrough, 110 U. S. 651, and U. S. vs. Classic, 313 U. S. 299, nor a statutory right of action for damages, as in Nixon vs. Herndon, 273 U. S. 536; Smith vs. Allwright, 321 U. S. 649; and King vs. Chapman, 154 Fed. (2) 460. In such cases the power and duty of the courts to

act is plain. Here equity is asked to interfere to achieve or frustrate a political result, and that through the discretionary remedy of injunction. Whether it be that the subject matter is not of equitable cognizance, or merely that equity should withhold its hand, we think the decision in Colgrove vs. Green, — U. S. —, June 10, 1946, requires us to deny equitable relief.

So concluding we might well stop. But as an appeal lies of right, in order that all questions may be ripe for consideration in the Appellate Court if necessary, we will briefly say that on the ultimate merits we do not think the State of Georgia has been shown to have deprived the plaintiffs of the equal protection of the laws. It was held in King vs. Chapman, supra, that the State of Georgia has made party primaries, when called by any political party, a part of the election machinery of the State, and that deprivations of voting rights by virtue of the primary statutes are deprivations by the State. And it is true that under the State Constitution the general election of a governor is not by county units, but by the consolidated popular vote. But there is nothing in the State Constitution in force in 1917 or now, that would prevent the Legislature from prohibiting primary elections altogether, or if they are permitted, from stating the conditions on which they may be held, if the parties elect to have them. The Constitution of the United States has nothing to do with State elections, save as specially provided in certain of the Amendments, Minor vs. Happersett, 21 Wall. 162; Breedlove vs. Suttles, 302 U. S. 277. The amendments relating to abridging the right to vote on account of race, color, or sex, are not involved here. The equal protection clause of the Fourteenth Amendment is alone relied on. Nothing is better settled than that legislative classifications are not by it prohibited if there is a rational basis for them. The three most recent Georgia Constitutions have classified the counties into three classes, based on population and to be readjusted after each census. A federal court can hardly say that Fulton and DeKalb Counties ought by virtue of the Fourteenth Amendment to have a fourth class created to give their voters proportional power and influence in the Legislature, or that the smaller counties should be put into

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another class having no representative. Our system of government, State and Federal, has never sought or demanded that each voter should have equal voting influence, though that might seem an ideal of democracy. In our federal government under its Constitution each State has in the Senate two "unit votes", wholly regardless of population, in the making of all laws, and in confirming treaties and appointments to federal offices. These unit votes also appear in the electoral college in choosing a president, so that there have been presidents who did not receive a majority of the popular votes. The people of the District of Columbia have no vote in their government but are ruled by a Congress elected wholly by others. Touching nominations, all the great political parties in their State and national organizations have followed in their nominating conventions the legislative strength of the States or counties represented, thinking that not to be irrational. Why should it be considered not rational for the Georgia Legislature, in authorizing the substitution of a primary for a convention to say the same rule should govern in either? Moreover there is a practical convenience in the County Unit System in primaries in this: The primary is an additional election, taking much time of voters from their work. In particular counties the contests may be not at all close, so that the result in that county is foreknown to its voters. Very few voters can abstain from voting, knowing their candidates will not suffer thereby. In the returns from the primary now in question it appears that in many of the smaller counties the vote was overwhelmingly for one candidate. Many voters may not have voted at all for that reason. It is argued too in behalf of the convention and county unit systems that it is for the general good that the great centers of population should not be allowed to control the policies and candidates of a political party.

It is undeniably true that there is a glaring inequality between Chattahoochee County and Fulton County in representation in the Legislature, and by consequence in applying the county unit rule to a primary. Perhaps the remnant of Chattahoochee County ought to be merged into an adjoining county. Perhaps Fulton County, which has absorbed Milton and Campbell Counties, ought to have the

representation of these counties added to its own. But the remedy for these exceptional situations is to be sought through changes in the law, rather than by appeal to courts of equity to upset the law as unconstitutional because of a hardship that has arisen.

We conclude on all grounds that an interlocutory injunction should be denied.

(S.) SAMUEL H. SIBLEY,
United States Circuit Judge.
(S.) LOUIE W. STRUM,
United States District Judge.
(S.) F. M. SCARLETT,
United States District Judge.

(6932)

INDEX

Subject Index

I. Introductory statement 1

II. A substantial federal question is involved 3-5

III. The complaint, while concerning political action, sought protection from private wrongs to appellants and the class they represent 6-11

IV. Relief may be effectively granted 12-16

(a) By declaring the statute under attack unconstitutional

(b) By approving injunctive relief against the Secretary of State

V. Preliminary inquiry should be limited to the jurisdiction of this Court on appeal. Questions of equitable jurisdiction to grant relief go to the merits of the case 17-18

Appendix "A" — Complaint and amendment thereof consolidated into one instrument 19-33

Table of Cases Cited

Attorney General v. Suffolk County Commissioners, 224 Mass. 598, 113 N. E. 581 8

Bell v. Hood, ___ U.S. ___, 66 S. Ct. 773, ___ L. Ed. ___ 4, 18

Binderup v. Pathe Exchange, 263 U. S. 291, 44 S. Ct. 96, 68 L. Ed. 308 18

Breedlove v. Suttles, 302 U. S. 277, 58 S. Ct. 205, 82 L. Ed. 252 3

Busch v. Jones, 184 U. S. 598, 22 S. Ct. 511, 46 L. Ed. 707 16

Colegrove v. Green, ___ U. S. ___, 66 S. Ct. 1198, ___ L. Ed. ___ 9, 11

Creager v. Bryan, 287 Fed. 362 9

Gates v. Long, 172 Tenn. 471, 113 S. W. 2d 388 5

Giles v. Harris, 189 U. S. 475, 23 S. Ct. 639, 47 L. Ed. 909 10

Guinn v. United States, 238 U. S. 347, 35 S. Ct. 926, 59 L. Ed. 1340 3

Table of Cases Cited (Contd.)

Honeyman v. Hanan, 300 U. S. 14, 57 S. Ct. 350, 81 L. Ed. 476 16

Hughes Federal Practice (1931) Par. 268 9

Lane v. Wilson, 307 U. S. 268, 59 S. Ct. 872, 83 L. Ed. 1281 ..... 7, 10

McPherson v. Blacker, 146 U. S. 1, 13 S. Ct. 3, 36 L. Ed. 869 3

Minnesota v. National Tea Co., 309 U. S. 551, 60 S. Ct., 676, 84 L. Ed. 920 16

Minor v. Happersett, 21 Wall. 162, 22 L. Ed. 627 3

Nixon v. Condon, 286 U. S. 73, 52 S. Ct. 484, 76 L. Ed. 984 7

Nixon v. Herndon, 273 U. S. 536, 47 S. Ct. 446, 71 L. Ed. 759 ..... 4, 6, 7

North Chicago R. Mill Co. v. St. L. Ore & Steel Co., 152 U. S. 596, 14 S. Ct. 710, 38 L. Ed. 565 16

Pope v. Williams, 193 U. S. 621, 24 S. Ct. 573, 48 L. Ed. 817 3

Public Serv. Co. of N. Ill. v. Corboy, 250 U. S. 153, 39 S. Ct. 440, 63 L. Ed. 905 15

Sawyer, In Re: 124 U. S. 200, 8 S. Ct. 482, 31 L. Ed. 402 10

Siebold, Ex parte, 100 U. S. 371, 25 L. Ed. 717 ..... 4, 7

Smith v. Allwright, 321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 891 7

Smyth v. Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819 14

Snowdon v. Hughes, 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497 ..... 4, 7

Sterling v. Constantin, 287 U. S. 378, 53 S. Ct. 190, 77 L. Ed. 375 14

Swafford v. Templeton, 185 U. S. 487, 22 S. Ct. 783, 46 L. Ed. 1005 18

Taylor v. Beckham, 178 U. S. 548, 20 S. Ct. 890, 44 L. Ed. 1187 10

The Fair v. Kohler Die & Specialty Co., 228 U. S. 22, 33 S. Ct. 410, 57 L. Ed. 716 18

BLEED THROUGH– POOR COPY

United States v. Classic, 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 4

United States v. Moseley, 238 U. S. 383, 35 S. Ct. 904, 59 L. Ed. 1355 4

Walton v. House of Representatives, 265 U. S. 487, 44 S. Ct. 628, 68 L. Ed. 1116 10

Wiley v. Sinkler, 179 U. S. 58, 21 S. Ct. 17, 45 L. Ed. 84 ..... 4, 7

Yale Law Journal (1923) 33 Y. L. J. 115 7

Yarbrough, Ex parte, 110 U. S. 651, 4 S. Ct. 152, 28 L. Ed. 274 ..... 3, 7

Young, Ex parte, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714 14

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IN THE
SUPREME COURT OF THE UNITED STATES

MRS. ROBERT LEE TURMAN and
CULLEN B. GOSNELL
Appellants

vs.

J. LON DUCKWORTH, as Chairman Georgia State Democratic Executive Committee;

MISS GRACE CANNINGTON, as Secretary Georgia State Democratic Executive Committee;

THE STATE DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEOGIA, an unincorporated association; and

BEN W. FORTSON, JR., as Secretary of State of Georgia
Appellees

Number 532

October Term 1946

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

Now come the Appellants, pursuant to Rule 12 and Rule 7 of the Supreme Court of the United States, within twenty days after service upon Appellants of Appellees' Statement of Matters Making Against the Jurisdiction of the Supreme Court of the United States and Motion to Dismiss or Affirm, and file this, Appellants' Brief in Opposition to Appellees' Statement and Motion, and show:

I.

INTRODUCTORY STATEMENT

Only on account of the possibility of a decision being made upon Appellees' Motion before briefs are received in the Court on the merits of the case, advantage is being taken of the provisions of the rule allowing Brief in Opposition to the Motion.

While it seems unthinkable that the serious and substantial constitutional questions raised in the case would be summarily disposed of, as a matter of cautious concern and in advance of full briefs on the subject, we respectfully call the Court's attention to certain matters pertinent to jurisdiction.

Brief reference to some of the more important cases is hereafter made, but obviously an exhaustive treatment of the subject can not be made in advance of filing full briefs on the merits of the case, now in course of preparation but not yet ready for filing in this Court.

For the convenience of the Court we attach hereto as Appendix A a copy of the Complaint and amendment thereof (omitting verification) which is consolidated into one instrument.

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II.

A SUBSTANTIAL FEDERAL QUESTION IS INVOLVED

The right to vote in any election by the people in Georgia for Governor and other State house officers is conferred by the State Constitution but as so conferred such right is not qualified so as to permit a difference in valuation between an individual's vote in one sub-area and another sub-area in a State-wide election or primary. By a State statute, i.e. the county unit law now under attack, there is State action grossly and purposely discriminatory in the evaluation of petitioners' votes after the same have been initially cast. When a State statute so deprives a citizen of the United States of his rightful evaluation of the vote which he has cast there arises a substantial federal question under the equal protection clause of the 14th Amendment of the Constitution of the United States.

The cases cited by Appellees, on their asserted point that because the right to vote in a State election is not federally conferred no substantial federal question is involved, Minor v. Happersett, 21 Wall. 162,22 L. Ed. 627; Ex parte Yarborough, 110 U. S. 651, 4 S. Ct. 152, 28 L. Ed. 274; McPherson v. Blacker, 146 U. S. 1, 13 S. Ct. 3, 36 L. Ed. 869; Guinn v. United States, 238 U. S. 347, 35 S. Ct. 926, 59 L. Ed. 1340; Breedlove v. Suttles, 302 U. S. 277, 58 S. Ct. 205, 82 L. Ed. 252, do not comprehend the situation or facts of the present case. The further rule is applicable and pertinent to-wit: "provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution."

> *Pope v. Williams*
> 193 U. S. 621, 24 S. Ct. 573, 575
> 48 L. Ed. 817

In the present case the discrimination has been made between individuals, by State statute, in violation of the equal protection clause of the 14th Amendment to the Federal Constitution.

Nixon v. Herndon,
273 U. S. 536, 47 S. Ct. 446, 71 L. Ed. 759;
U. S. v. Classic,
313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368;
Snowdon v. Hughes,
321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497;
Ex parte Siebold,
100 U. S. 371, 25 L. Ed. 717;
Wiley v. Sinkler,
179 U. S. 58, 21 S. Ct. 17, 45 L. Ed. 84

The doctrine with reference to protection and enforcement of rights arising under the Constitution and laws of the United States discussed in Appellees' Motion applies only to the privilege and immunities clause of the 14th Amendment (also to the 15th Amendment), not to the equal protection clause. For instance, it is noted that in the recovery allowed in Nixon v. Herndon, supra, it was commented that it was unnecessary to consider the 15th Amendment "because it seems to us hard to imagine a more direct and obvious infringement of the 14th." A federally derived right is different from a federally protected right. The equal protection clause of the 14th Amendment is not dependent upon the right (protection of which is denied by State action) being a right granted by the laws of Constitution of the United States. "The laws" which must be administered equally are State laws — with Federal protection against discrimination.

Bell v. Hood,
Page 774, Headnote 6 of 66 S. Ct.

The right to have one's vote counted (even though the right to vote is derived from the State) is as open to protection (under the equal protection clause of the 14th Amendment to the Federal Constitution) as the right to put a ballot in the box under a voting privilege conferred by the Constitution or laws of the United States.

U. S. v. Moseley,
238 U. S. 383, 35 S. Ct. 904, 50 L. Ed. 1455.

In dealing with an attack on a similar statute depreciating by counties the value of individual votes, the Supreme

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Court of Tennessee found no difficulty in striking it down as violative of the equal protection clause of the "State" and "Federal" Constitutions. Where in Gates v. Long, 172 Tenn. 471, 113 S. W. 2d 388, 391, the Court stated:

> "Under equal protection clauses of State (Tennessee) and Federal Constitutions, the State cannot confer upon one class of voter the right to vote in primary elections of their party and deprive another class of the right unless discrimination can be justified on some rational basis. . . . . The State may not without reason abridge the right of voter to vote in primary election of their party in one class of voters and leave the right whole in another class."

III.

THE COMPLAINT, WHILE CONCERNING POLITICAL ACTION, SOUGHT PROTECTION FROM PRIVATE WRONGS TO APPELLANTS AND THE CLASS THEY REPRESENT.

Appellees contend that the questions involved in this case are purely political questions and that equity is without jurisdiction to enforce a purely political right. It is submitted that the traditional doctrine that equity will not ordinarily interfere with purely political matters has no application in the case at bar.

This action is not merely to rid the State of an evil and invalid electoral system, but is one that seeks to strike down a statute plainly and deliberately discriminating against appellants. Appellants are not complaining that Fulton, or DeKalb County, has only six unit votes, but rather that appellants, as individual voters, have only a fractional part of the voting effectiveness of other voters in the voting area (statewide). The system of giving effect to county lines in evaluating votes is highly discriminatory in that the Constitution of Georgia gave to each voter the same right. The particular number of votes any county has is merely illustrative of the extent of the discrimination caused by the county unit system.

It makes no difference that the subject matter of this controversy involves political rights. If the appellants had been wholly denied the right to cast their ballots, they could maintain an action in the Federal Court for damages.

> "The objection that the subject matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damages and that private damage may be caused by such political action and may be recovered for in a suit at law concurrently has not been doubted for over 200 years."

Nixon v. Herndon,
273 U. S. 536, 47 S. Ct. 446, 71 L. Ed. 759.

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"Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights."

Snowden v. Hughes,
321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497.

See also:

Smith v. Allwright,
321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 891;
Nixon v. Condon,
286 U. S. 73, 52 S. Ct. 484, 76 L. Ed. 984;
Lane v. Wilson,
307 U. S. 268, 59 S. Ct. 872, 83 L. Ed. 1281;
Wiley v. Sinkler,
179 U. S. 58, 21 S. Ct. 17, 45 L. Ed. 84.

It is also clear that the criminal courts will act in appropriate cases of fraud in elections.

Ex parte Yarbrough,
110 U. S. 651, 4 S. Ct. 152, 28 L. Ed. 274;
Ex parte Siebold,
100 U. S. 371, 25 L. Ed. 717.

Equity like the courts of law will act to protect from injury and redress a wrong. The only points in question in the exercise of such jurisdiction are the existence of adequacy of another remedy at law and the propriety of exercising such jurisdiction. In political matters the propriety of exercising jurisdiction applies with especial emphasis, because of the extreme importance of the elective process in our government. However, when the right is clear, the threatened evil is great, and the result unattainable by other remedies, equity should assume jurisdiction as a matter of right.

See: LONG, "Equitable Jurisdiction to Protect Person Rights." (1923) 33 Yale L. J. 115.

Appellants are entitled in this case to the protection of an injunction. Such relief will not invade the exclusive functions of any court of law, or other branch of our govern-

ments, either State or Federal, and would require no supervision by this Court of any complicated state election machinery.

The appellants' prayers for relief in equity are based upon a definite legal right and not merely upon privilege.

In the case of Attorney General v. Suffolk County Commissioners, 224 Mass. 598, 113 N.E. 581, the Court in discussing the right to vote said:

> "The right to vote is a fundamental personal political right. Unlawful interference with the right to vote, whether on the part of public officers or private persons, is a private wrong for which the law affords a remedy although it might have significant political results. Any act of the Legislative limiting or in any way interfering with this right would be invalid. While the right to vote for members of the Legislature is in a sense a political right, it is also a precious personal right ..... The circumstances that political consideration might be connected with rights affords no justification to courts for refusing to adjudicate causes rightfully pending before them. Such a controversy, even though political in many of its aspects, is of judicial cognizance ..... There can be no equality among citizens if the vote of one county have considerably more than that of another in electing public officers."

Appellants have the undoubted right to vote on an equality with other voters. They have with equal certainty been denied this right by statute which has so diluted their votes as to render them almost worthless. They are entitled to invoke the equal protection clause of the Fourteenth Amendment. To say the Federal Court will not intervene and use its equitable powers to protect such a right would be to admit the guaranty of the Fourteenth Amendment is not operative.

There is no political tribunal in Georgia for the correction of this injury.

The District Judges in their opinion in this case below stated:

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"But the remedy for these exceptional situations is to be sought through changes in the law, rather than by appeal to courts of equity to upset the law as unconstitutional because of a hardship that has arisen."

It is no answer to appellants to say they may seek their remedy in the legislature of Georgia. The very noose which they now find about them would confront them there and make any appeal there unavailing.

The remedies available at law are inadequate.

Appellants could not sue for nor measure their damages. As pointed out hereinabove, the State of Georgia has no equal protection clause in its Constitution. Further, no remedy in the nature of a mandamus proceeding is available in the Federal Courts in a case of this character.

Creager v. Bryan,
287 Ftd. 362;

Hughes, "Federal Practice" (1931) Para. 268.

Mr. Justice Black, in his dissenting opinion in the case of Colegrove vs. Green, 66 S. Ct. 1198, advance sheet of July 1, 1946, aptly stated:

"Under these circumstances, and since there is no adequate remedy for depriving a citizen of his right to vote, equity can and should grant relief."

Appellants instituted this action at the proper time.

The District Court Judges further stated in their opinion:

"A better case for interfering with the application of the unit rule by the Democratic Executive Committee would have been presented if the Plaintiffs had promptly moved to assert its constitutional invalidity and to stop its application when the executive committee, which had the right to determine whether a primary or a convention should be held for nominations, did call the Primary of July 17th, and published the rules under which it should be conducted, including expressly the county unit rule."

It is submitted that any such action by Appellants as suggested by the Court below would have been prematurely asking for an adjudication of an abstract question, it being impossible to predict the result of the Primary election. Further, it would have been an unquestioned effort to involve the Federal Court in a matter of supervision of party politics in Georgia.

Giles v. Harris,
189 U. S. 475, 23 S. Ct. 639, 47 L. Ed. 909.

The moment this suit was brought was the only time, and this action the only way, appellants could lay hands on the tangible means of protecting their rights. There still remains time for this Court to prevent this wrong against the appellants from being consummated.

In support of their contention that equity is without jurisdiction to enforce a purely political right appellees have cited the following cases, which, however, are readily distinguishable from the case at bar and establish no precedent for a denial of equitable relief in this case:

In re: *Sawyer* (124 U. S. 200, 8 S. Ct. 482, 31 Law Ed. 402). Equitable relief denied, an adequate remedy at law was available.

Walton v. House of Representatives (265 U. S. 487, 44 S. Ct. 628, 68 L. Ed. 1116). Equitable relief denied, an adequate remedy at law was available.

Taylor vs. Beckham (178 U. S. 548, 20 S. Ct. 890, 44 L. Ed. 1187). It was held inappropriate for the Federal Court to go beyond its sphere of action and interfere with the decision of the Supreme Court of Kentucky sustaining a determination of an election contest made by the General Assembly under the authority of the State Constitution.

Giles v. Harris, supra. Court of equity is not prepared to supervise the voting in Alabama.

Lane v. Wilson (307 U. S. 268, 59 S. Ct. 872, 83 L. Ed. 1281). This was a case where an appropriate action at law for damages was brought to enforce the Fifteenth Amendment.

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Colegrove v. Green, supra. Intervention by a Federal Court would be an unreasonable interference with the authority of the State legislature and the Congress of the United States.

No case has been found exclusively decided upon the ground that equity will not protect personal or political rights. The sole point in question is the existence or adequacy of another remedy provided by law. Nor has there been found any instance where it has been judicially determined by this Court that equity would refuse relief to individaul citizens in an appropriate case upon unwarranted interference or discrimination in their enjoyment of the right of franchise.

To follow appellees in their contentions in this case would be to ignore the principles of logic and justice. Public policy does not sanction a doctrine which disregards personal and political rights, the creatures of social progress and civilization.

IV.

RELIEF MAY BE EFFECTIVELY GRANTED

(a) By declaring the Statute under attack unconstitutional.

(b) By approving injunctive relief against the Secretary of State.

The case as filed sought to prevent the placing of the name of the candidate for Governor, nominated by the method claimed to be illegal, on ballots for the election to be held on November 5th, 1946. The Complaint was filed four days before this action was taken by one of the defendants, the Secretary of State. This action by him was after jurisdiction had been taken by the District Court and any acts done by the defendant in the meantime were subject to final decree in the case. The power of the Court attached as of the date the suit was allowed to be filed. Acts taken thereafter by defendants are within control of the Court and subject to subsequent decree holding them illegal and ineffective. At the time of the hearing by the three-Judge Court, ballots containing the name of the person so nominated had been furnished to the County authorities for the conduct of the election. But it was shown by amendment that the time had also elapsed by law for the filing of any other candidate or the placing of any other name on the ballot and it was shown that but for the particular provision of the statute under attack, the name of this candidate would not have been placed on the ballots as the nominee. It was shown that if the votes of Plaintiffs, and others similarly situated, had been counted on an equal basis with other votes in the State, the name of another candidate would have been placed on the ballot as the nominee since the other candidate received the highest number of votes, a plurality, or else that no nominee was chosen since no one received a majority. But is was also shown at the time of the hearing that the election process in the case of a candidate for Governor is not over with the balloting in the General Election to be held on November 5th, 1946, since

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under a provision of the State Constitution* the Secretary of State, after the holding of the election, is required to hold the ballots showing the result of voting and to transmit them to the President of the Senate when the General Assembly convenes (on January 13th, 1947). All of this, of course, contemplates a lawful election with the name of a lawful nominee or candidate on the ballot. Therefore, since after the filing of the Plaintiffs' Petition and before the hearing by the three-Judge Court, the time had expired by law for the name of any other candidate to be placed on the election ballots, Plaintiffs prayed for injunction against the Secretary of State to prevent him from transmitting the voting results showing the name of a candidate so illegally nominated and chosen. Since such candidate was illegally nominated, the election in which the ballots contained only the name of the illegal nominee could not be a valid election, out of which the normal duty of the Secretary of State to transmit the result could arise. Had the unconstitutionl statute been ignored as it should have been, there was no Democratic candidate nominated because no one had a majority of popular votes. Injunction against such an act would be appropriate because such action would amount to but another step in the consummation of the illegal process begun under the discriminatory statute complained of. Whether on the merits

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*Article V, Section I, Paragraph III of the Constitution of Georgia, provides:

"The returns for every election of Governor shall be sealed up by the managers, separately from other returns, and directed to the President of the Senate and Speaker of the House of epresentatives, and transmitted to the Secretary of State, who shall, without opening said returns, cause the same to be laid before the Senate on the day after the two houses shall have been organized, and they shall be transmitted by the Senate to the House of Representatives."

Article V, Section I, Paragraph IV of the Constitution of Georgia, provides in substance that the General Assembly shall convene and open and publish the returns of the election and that the person receiving the majority of the whole number of votes shall be declared duly elected Governor.

of the question Plaintiffs were entitled to the injunctive relief prayed for, is a question to be determined upon a full consideration of the case, but if they were entitled to it, certainly it could be granted and the question could not become moot prior to January 13, 1947. Also, whether on the merits the relief sought is in reality against the State in the sense in which the State is the party to the suit to be sued, only with its consent, is a matter which this Court would determine—in the exercise of the jurisdiction over the controversy — after full hearing. This relief against the Secretary of State was incidental to the main relief prayed for, to-wit: the striking down the statute which abridged Plaintiffs' right to vote. There was no affirmative relief or recovery sought against the State. Two of its citizens, for themselves and others in their class, simply invoked the protection of the United States Constitution against the discriminating provision of an Act of its General Assembly; the wrong to them is not yet complete, it is still in process; they seek to stop it before it is consummated.

Where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the Federal Courts in order that the persons injured may have appropriate relief. In such a case the suit is not against the State within the meaning of the State's immunity from suit.

Sterling v. Constantin,
287 U. S. 378, 53 S. Ct. 190, 193, 77 L. Ed. 375;
Ex parte Young,
209 U. S. 123, 28 S. Ct. 441, 442, 449, 450, 451,
52 L. Ed. 714;
Smyth v. Ames,
169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819.

Although a state may not be sued without its consent, nevertheless a State Officer acting under color of his official authority may be enjoined from carrying into effect a State law asserted to be repugnant to the Constitution of the United States, even though such injunction may cause the State law to remain inoperative until the constitutional question is judicially determined.

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Public Serv. Co. v. Corboy,
250 U. S. 153, 39 S. Ct. 440, 63 L. Ed. 905.

From Ex parte Young, supra, at page 453, the following statement is authority for the position that the Secretary of State may be enjoined, even though the particular duty to be performed is imposed by the provision of some other act (in this case by the Constitutional provision shown in the footnote referred to above):

> "In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.
>
> "It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases, it is true, the duty of enforcement has been so imposed (154 U. S. 362, 366 Sec. 19 of the act) but that may possibly make the duty more clear; if it otherwise exists it is equally efficacious. The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists."

Besides the prayer for injunctive relief against the Secretary of State as to acts not yet performed and the prayer for decree as to acts already performed, the Petitioners sought declaratory judgment and that the discriminatory provisions of the statute be declared and adjudicated unconstitutional as violative of the equal protection clause of the 14th Amendment to the United States Constitution. In any event, it could not be doubted that at the time the Petition was allowed filed there was an equitable question that had not become moot and the right to declaratory judgment is based on equity at the date of filing.

Equtable jurisdiction must be determined by the conditions existing at the time the bill is filed and not by conditions which come into existence after the commencement of the suit.

Busch v. Jones,
184 U. S. 598, 46 L. Ed. 707, 22 S. Ct. 511;
North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co.,
152 U. S. 596, 38 L. Ed. 565, 14 S. Ct. 710.

Acts violative of petitioners' constitutional rights performed by the Secretary of the State of Georgia subsequent to the filing of the petition in this case therefore cannot affect the jurisdiction of the Federal Courts to award such relief as is proper upon a hearing on the merits. The United States Supreme Court in the exercise of its appellate jurisdiction, has power, not only to correct errors of judgment under review, but to make such other disposition of the case as justice requires.

Honeyman v. Hanan,
300 U. S. 14, 57 S. Ct. 350, 81 L. Ed. 476;
State of Minnesota v. National Tea Co.
309 U. S. 551, 60 S. Ct. 676, 84 L. Ed. 920.

Contention is made in Appellees' Motion that the Complaint seeks by injunction against the Secretary of State, in purpose and effect, to control the action of the General Assembly of Georgia. It does not. What the Legislature will do when it finds there are no election returns transmitted to it will be for it in its full competence to decide. We have not sought to control its action and this but emphasizes that the question does not become moot until that time.

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V.

PRELIMINARY INQUIRY SHOULD BE LIMITED TO THE JURISDICTION OF THIS COURT ON APPEAL. QUESTIONS OF EQUITABLE JURISDICTION TO GRANT RELIEF GO TO THE MERITS OF THE CASE.

Decision of so important and substantial a question, regardless of ultimate disposition, should not, we respectfully submit, be made upon a mere preliminary examination to ascertain this Court's jurisdiction and in advance of full consideration on the merits of the case. The Complaint attacked a statute as being violative of the "equal protection of the laws" clause of the 14th Amendment to the United States Constitution. It can not be argued that the attack made or the question raised by it is frivolous. The Complaint sought injunctive relief against State and party officials and was heard by a three-Judge Court, appeal being allowed as a matter of right, all in accordance with statute. So the only jurisdictional question that can arise at this time is one that would be determinative of the whole controversy. The order appealed from denies an injunction "because of —— the conclusion of law filed herewith." One of the "conclusions of law" was that the statute of 1917 under attack was not unconstitutional. Therefore, to dismiss the appeal would in effect sustain the constitutionality of the county unit law. To affirm it would have the same effect. The question is one of too much public interest (with such far reaching possibilities of establishing a basis of future discrimination by legislatures in states in which the state constitution omits an equal protection clause) to be disposed of without a full hearing and argument.

Jurisdiction is not defeated by the possibility that the averments might possibly fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before

the Court has assumed jurisdiction over the controversy. If the Court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

Bell v. Hood,
No. 344, decided April 1, 1946.
.....U. S....., 66 S. Ct. 773,.....L. Ed.....;
Swafford v. Templeton,
185 U. S. 487, 493, 494, 22 S. Ct. 783, 785, 786,
46 L. Ed. 1005;
Binderup v. Pathe Exchange,
263 U. S. 291, 305-308, 44 S. Ct. 96-98-99,
68 L. Ed. 308.

The previously carved out exceptions to the foregoing are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous. The accuracy of calling these dismissals jurisdictional has been questioned.

Bell v. Hood, supra;
The Fair v. Kohler Die & Specialty Co.,
228 U. S. 22, 33 S. Ct. 410, 411, 57 L. Ed. 716.

Respectfully submitted,

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APPENDIX "A"

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

MRS. ROBERT LEE TURMAN
CULLEN B. GOSNELL
Plaintiffs
v.
J. LON DUCKWORTH,
as Chairman of the Georgia State Democratic Executive Committee;
MISS GRACE CANNINGTON,
as Secretary of the Georgia State Democratic Executive Committee;
THE STATE DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA,
an unincorporated association; and
BEN W. FORTSON, JR.,
as Secretary of the State of Georgia; Defendants;

CIVIL ACTION
Number 3013

CONSOLIDATED COMPLAINT AND AMENDMENT

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA:

1. The plaintiff, Mrs. Robert Lee Turman, is a resident of Fulton County, State of Georgia, and the plaintiff, Cullen B. Gosnell, is a resident of DeKalb County, State of Georgia, and said plaintiffs in their own behalf and on behalf of all other persons similarly situated bring this action against

the defendants hereinafter named for injunction and other relief as will more fully appear hereinafter.

2. This action arises under the 14th Amendment to the Constitution of the United States, Section I; Section 24 (14) of the Judicial Code, USCA, Title 28, Sec. 41, subd. 14; and Civil Rights Act, USCA, Title 8, Sec. 42, 2 FCA, Title 8, Sec. 43. Plaintiffs as citizens and registered voters of the State of Georgia are given by the Constitution of said State, the right to vote in all general elections for Governor and other State officials, who under said Constitution are required to be elected in a statewide election by a majority of votes cast. The legislature of said state in 1917 set up a system of nominations for Governor and other State officials by party primaries, as a part of the State election system, and required the result of such primary elections to be determined by a County unit plan which deprived these plaintiffs of equal protection of their right to have their votes as residents of more populous counties effective on the same or approximate basis as residents of counties with far less population. Plaintiffs have no adequate remedy except in equity because damage is irreparable and not compensable in money.

3. Each of the plaintiffs is a citizen of the United States and of the State of Georgia and a duly registered and qualified voter for the year 1946 in the county of his residence as above set out and is entitled to vote in all elections, including primaries, held in said State and to have his vote counted as of equal value with that of any other voter in the State. Plaintiffs did vote in the Democratic primary held July 17, 1946, and both of them cast their votes in said primary for the candidate for Governor of Georgia who obtained the plurality of all votes cast in said primary but did not obtain the plurality of the county unit votes, by which the Act of 1917 requires the result of said primary to be determined.

4. Defendant, J. Lon Duckworth, is Chairman of the Georgia State Democratic Executive Commitee and a resident of DeKalb County, Georgia, which County is in the Northern District of the Federal Courts of the State of Georgia.

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Defendant, Miss Grace Cannington, is Secretary of the State Democratic Executive Committee and a resident of Seminole County, Georgia, which County is in the Middle District of the Federal Courts of the State of Georgia.

Defendant, The Democratic Executive Committee of the State of Georgia, is an unincorporated association and may be sued in its common name for the purpose of enforcing against it a substantive right existing in plaintiffs under the Constitution of the United States, and upon which service may be perfected by serving J. Lon Duckworth, Chairman of said Committee.

5. Defendant, Ben W. Fortson, Jr., is the duly appointed, qualified, and acting Secretary of the State of Georgia, who is a citizen and resident of the County of Wilkes, and State of Georgia; within the jurisdiction of the United States District Court for the Southern District of Georgia, Augusta Division; Sec. 40-503 of the Code of Georgia of 1933, provides that the Secretary of State shall "reside at the capital" (which is Atlanta, Fulton County, Georgia), and the said Fortson also resides at said capital, which is within the jurisdiction of the United States District Court for the Northern District of Georgia, Atlanta Division.

6. The Democratic primary held throughout Georgia on July 17, 1946, was held under and pursuant to the Statute passed by the Legislature and approved by the Governor August 14, 1917, known as the act for Nomination by County Units; as modified or amended by an Act of the General Assembly of Georgia approved January 7, 1944 (Ga. Laws 1944, ex. sess. pp. 2-8), known as the Soldier's Voting Law, and likewise amended by an Act of the General Assembly of Georgia approved March 20, 1943 (Ga. Laws 1943, pages 347-348); and as further modified by an Act of the General Assembly of Georgia, approved February 1, 1946 (Ga. Laws 1946, p._____), known as Act No. 632 relating to duties of the Secretary of State. Plaintiffs attach hereto as Exhibit "A' the pertinent portions of said Acts of the General Assembly of Georgia and pray that the same may be considered as part of this complaint with leave of full reference thereto.

7. Plaintiffs allege that the vital provisions of said law which deprive plaintiffs of the full and fair value of their votes as compared with other votes are as follows:

Georgia Code of 1933, Sertion 34-3212, codified from Georgia Laws 1917, pp. 183-189, provides: (in part)

". . . . . Candidates for nominations to the above named offices who receive, respectively, the highest number of popular votes in any given county shall be considered to have carried such county, and shall be entitled to the full vote of such county on the county unit basis, that is to say, two votes for each representative to which such county is entitled in the lower House of the General Assembly. If in any county any two or more candidates shall tie for the highest number of popular votes received, the county unit vote of such county shall be equally divided between the candidates so tying. All such county unit votes shall within 10 days after such primary be accurately consolidated by the chairman and secretary of the State Committee of the political party holding such primary, and published in a newspaper published at the Capitol, within three days after the completion of the consolidation, certified under the hands and seals of said chairman and secretary; and the candidates for said offices, respectively, who shall receive a majority of all the county unit votes, throughout the entire state, upon the basis above set forth, shall be declared by the State convention of the party holding such primary, or the permanent chairman thereof, or other party authority, without the necessity of a formal ballot, to be the nominees of such party for the above-named offices, respectively, and it shall be the duty of the State executive committee elected or appointed at such convention, or by its authority, or the chairman or secretary thereof, or other authority of such party, to see to it that the names of all such successful candidates shall be placed upon the tickets or ballots of such party at the general election following such primary, and such successful candidates shall be considered, deemed and held as the duly nominated candidates of such party for the offces named: . . . . ."

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Georgia Annotated Code, Supplement, Section 34-3215a, taken from Georgia Laws 1943, pp. 347-348, provides:

"Immediately after the consolidation of the votes in any such primary election a certificate, showing the names of such candidates and the offices for which they are candidates shall be filed in the office of the Secretary of State of this State; such certificate to be signed by the chairman and secretary of the State Committee of the political party holding such primary. Said certificate shall show by counties the total number of popular votes and the county unit votes received by each candidate in any such primary election. (Acts 1943, p. 347)."

8. The provisions of the Act of the General Assembly of Georgia of 1917, above quoted are contrary to that clause of the 14th Amendment of the Constitution of the United States which reads: ". . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . . . ; nor deny to any person within its jurisdiction the equal protection of the laws."

9. The provision quoted from the Act of 1917 is a deliberate, express, and unreasonable discrimination in varying degrees against all voters residing in any but the smallest counties, said discrimination as to registered voters residing in Fulton County depreciating their votes to such an extent that it requires 106 plus votes in Fulton County to have the same value as one vote in Chattahoochee County. So also it requires 71 votes in Fulton County to have the same value as 1 vote in Quitman County. Under the provisions of the Constitution of Georgia plaintiffs are entitled to cast their ballots in elections held for the office of Governor, and as they allege, to have the same counted without depreciation. Since under the statutes as herein shown the primaries held for nomination of candidates for Governor are made an integral part of the election machinery of the State, said provisions of the Constitution likewise extend to such primaries; and, therefore, the provisions of the Act of 1917 herein complained of violate plaintiffs' rights as alleged in paragraph 8 of the petition.

10. The Constitution of the State of Georgia as amended in 1945 contains the following provisions as to the election of Governor:

"*Election for Governor.* The first election for Governor, under this Constitution, shall be held on Tuesday after the first Monday in November of 1946, and the Governor-elect shall be installed in office at the next session of the General Assembly. An election shall take place quadrennially thereafter, on said date, until another date be fixed by the General Assembly. Said election shall be held at the places of holding general elections in the several counties of this State, in the manner prescribed for the election of members of the General Assembly, and the electors shall be the same."

Article V, Section I, Para. II

"*Returns of elections.* The returns for every election of Governor shall be sealed up by the managers, separately from other returns, and directed to the President of the Senate and Speaker of the House of Representatives, and transmitted to the Secretary of State, who shall, without opening said returns, cause the same to be laid before the Senate on the day after the two houses shall have been organized, and they shall be transmitted by the Senate to the House of Representatives."

Article V, Section I, Para. III

"*How returns published.* The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; but, if no person shall have such majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly,

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a majority of the members present shall be necessary to a choice.

Article V, Section I, Para. IV

11. As illustrating the discrimination against the voters of the more populous counties plaintiffs show that Fulton County, in which one of the plaintiffs resides, did in the Democratic primary of July 17, 1946 cast 84,550 votes; that DeKalb County, in which another of the plaintiffs resides, did in the Democratic primary of July 17, 1946 cast 26,770 votes; that Chattahoochee County, one of the counties of said State, cast only 265 votes and that under the said Primary Act above set forth Fulton County has only six unit votes and Chatttahoochee County has two unit votes, thus making the vote of one person in Chattahoochee County equal to 106 plus votes in Fulton County and 33 plus votes in DeKalb County. Attached hereto as Exhibit "B", there is set out a table showing the complete vote for Governor in said primary of July 17, 1946.

12. Plaintiffs allege that it is the intention of defendants, J. Lon Duckworth, as Chairman of State Democratic Executive Committee, and Miss Grace Cannington, as Secretary of the State Democratic Executive Committee, to file immediately with the Secretary of State the certificate required by the Act of the General Assembly of Georgia of 1943, quoted above, and that the Secretary of State of Georgia will receive and file said certificate, and they will do so unless enjoined by this coutt.

13. Plaintiffs allege that if said certificate is filed with the Secretary of the State of Georgia, he will, unless enjoined by this court, take further steps under the established practice and the laws of Georgia towards effectuating the placing of names of those candidates for Governor and other State officials, as shown by said certificate as the nominees of the Democratic party on the official ballot as the nominees of the Democratic party for the General Election in 1946 and that said candidates would be elected in the November General Election without having been nominated by the votes of the majority of the Democratic voters of the State.

14. Plaintiffs allege that any rule adopted by the Democratic party based upon the illegal and unconstitutional County Unit rule, declaring the result of said primary election, or setting up rights in any candidate having a majority of unit votes, is itself illegal, null and void, and The Democratic Executive Committee, the Chairman and Secretary of said Committee should be enjoined from recognizing or enforcing said illegal rule.

15. Plaintiffs allege that since the filing of the original complaint (in this action) the time has expired within which candiates may, under the laws of Georgia, qualify to be voted on in the general election to be held on November 5th, 1946, and therefore the only name which will be submitted to the voters as a candidate for Governor in said election under the law now being enforced is that of the candidate who in the primary of July 17th, 1946 received the highest county unit vote but who did not receive the highest popular vote, and who being as herein alleged illegally nominated, can not become lawfully elected. Hence, the prayers hereinafter set out.

WHEREFORE, plaintiffs pray that this bill be allowed to be filed and process and summons issue, and that the defendants be required to answer petitioners' complaint.

Petitioners further pray that a three-judge court be convened as speedily as convenient and that said court consider this petition and declare the county unit rule of counting votes (as provided in the statute above referred to) in the said late Democratic primary unconstitutional, null and void, and issue restraining orders or injunctions directed to the Chairman and Secretary of the State Democratic Committee, and the State Democratic Executive Committee, the defendants above named, enjoining them from complying with said illegal rule, or any rule of the State Democratic Party based thereon, in any way.

Petitioners further pray that The Democratic Executive Committee of the State of Georgia, the Chairman and the Secretary of said Democratic Executive Committee, be restrained and enjoined from declaring the person receiving the highest county unit votes to be the candidate of the Party;

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or from recognizing him as such; or from seating or recognizing any delegates to the Party convention, to be held on October 12, 1946 named by such candidate; or from taking any steps whatsoever to place the name of said candidate on the official ballot.

Petitioners further pray that the Secretary of the State of Georgia, an above mentioned defendant, be restrained or enjoined from taking any steps towards effectuating the placing of the names of those candidates for Governor, or other State officials, as shown by said certificate on the official ballot as the nominees of the Democratic party for the General Election in November, 1946.

Plaintiffs further pray that in the event the Secretary of State has already prepared and distributed the official ballot for the November General election, and the election is to be held with the nname of the candidate who received the majority of county unit votes in the primary, but less than a plurality of the entire number of votes cast throughout the State, as the sole Democratic nominee for Governor entered on said official ballot, that the Secretary of State be enjoined and restrained from causing the returns of said general election for Governor to be laid befode the Senate on the day after the two houses of the General Assembly of Georgia shall have been organized.

Plaintiffs pray for all such other relief as may be necessary and proper to protect their rights as duly registered and qualied votes from being unfairly discriminated against under the said county unit law.

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EXHIBIT A (Page 1)

Section 34-3212 of the Code of Georgia of 1933, codified from Georgia laws 1917, page 183, 184, reads:

"Whenever any political party shall hold primary elections for nominations of candidates for United States Senator, Governor, Statehouse officers, Justices of the Supreme Court, and Judges of the Court of Appeals, such party or its authorities shall cause all candidates for nominations for said offices to be voted for on one and the same day throughout the State, which is hereby fixed as the second Wednesday in September of each year in which there is a regular general election. Candidates for nominations to the above-named offices who receive, respectively, the highest number of popular votes in any given county shall be considered to have carried such county, and shall be entitled to the full vote of such county on the county unit basis, that is to say, two votes for each representative to which such county is entitled in the lower House of the General Assembly. If in any county any two or more candidates shall tie for the highest number of popular votes received, the county unit vote of such county shall be equally divided between the candidates so tying. All such county unit votes shall within 10 days after such primary be accurately consolidated by the chairman and secretary of the State committee of the political party holding such primary, and published in a newspaper published at the Capital, within three days after the completition of the consolidation, certified under the hands and seals of said chairman and secretary; and the candidates for said offices, respectively, who shall receive a majority of all the county unit votes, throughout the entire state, upon the basis above set forth, shall be declared by the State convention of the party holding such primary, or the permanent chairman thereof, or other party authority, without the necessity of a formal ballot, to be the nominees of such party for the above-named offices, respectively, and it shall be the duty of the State executive committee elected or appointed at such vonvntion, or by its authority, or the chairman or secretary thereof, or other authority of such party, to see to it that the names of all such successful candidates shall be placed upon the tickets or ballots of such party at the gen-

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eral election following such primary, and such successful candidate shall be considered, deemed and held as the duly nominated candidates of such party for the offices named: Provided, that in the event there are only two candidates for any particlar office referred to in this section, and it shall appear, after the consolidation of all of the county unit votes throughout the State, that said candidates have received an equal number of county unit votes, the one who shall have received a majority of the popular votes shall be declared by the State Convention of the party holding such primary, or the permanent chairman thereof, or other party authority, without the necessity of a formal ballot, to be the nominee of such party for such office; and it shall be the duty of the State executive committee elected or appointed at such convention, or by its authority, or the chairman or secretary thereof, or other authority of such party, to see to it that the name of such successful candidate shall be placed upon the tickets or ballots of such party at the general election following such primary, and such successful candidate shall be considered, deemed and held as the duly nominated candidate of such party for the office named: Provided, further, that if no convention of such party shall be called or held, the declaration of the result shall be made in such manner as may be prescribed by the State Committee or other authority of such party. (Acts 1917, pp. 173, 184.)

Section 8 of an act of the General Assembly of Georgia, approved January 7, 1944 (Ga. Laws 1944, Ex. Sess. pp.) commonly referred to as the soldiers' voting law reads:

"In order to allow more adequate time for the participation of members of the military in elections and party primaries, the following provisions are enacted in lieu of those now provided by law:

1. All candidates for national and state offices, or the proper authorities for the political party nominating them, shall file notice of their candidacy, giving their names and the offices for which they are candidates, with the Secretary of State, at least ninety days prior to the regular election. All candidates for district and county offices either by them-

selves or by the proper authorities of the party nominating them, shall file notice of their candidacy with the Ordinary of the County at least ninety days before the regular election.

2. Whenever any political party shall hold primary elections for nomination of candidates for office for Governor, State House Officers, Members of Congress, United States Senators, Judges of the Superior Courts, Justices of the Supreme Court, Judges of the Court of Appeals, Solicitors General, and Members of the General Assembly, which are by law voted on one and the same day throughout the State, said primary may be held on such date as may be fixed by the State Executive Committee of such party, and the State Executive Committee is authorized to fix such time for the said primary, second primary, or party convention as it may determine without respect to the time now provided by law as the date on which the said primary, second primary, or convention shall be held."

Section 34-3215a of the Supplemented to the Annotated Code of Georgia, codified from Ga. Laws 1943, page 347, reads as follows:

"Immediately after the consolidation of the votes in any such primary election a certificate, showing the names of such candidates and the office for which they are candidates, shall be filed in the office of the Secretary of State of this State; such certificate to be signed by the chairman and secretary of the State Committee of the political party holding such primary. Said certificate shall show by counties the total number of popular votes and the county unit votes received by each candidate in any such primary election. (Acts 1943, p. 347.)"

Senate Bill 142 Act. No. 632
Approved Feb. 1, 1946.

AN ACT

To repeal Chapter 34-14, Section 34-1401, Section 34-1402 and Section 34-1403, relating to blank forms, tally sheets and blank lists of voters, and certificates used in the

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holding of elections in their entirety, and to repeal paragraph 7 of Section 40-601 of the Code of Georgia of 1933, relating to the duties of the Secretary of States as to furnishing forms of returns, certificates, directions and advice to the Ordinaries with reference to holding elections and for other purposes; and substitute for said paragraph 7 a new paragraph prescribing the duties of the Secretary of State with reference to furnishing all necessary forms for holding elections, and to enact a new paragraph to be known as paragraph 7a and 7b, and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1

That Chapter 34-1401, 34-1402 and 34-1403 of the Code of Georgia of 1933 prescribing certain duties upon the Governor relating to the furnishing of certain blank forms, tally sheets and blank lists of voters and certificates used in the holding of election be and the same are hereby repealed in their entirety.

Section 2

That paragraph 7 of Section 40-601 of the Code of Georgia, relating to the duties of the Secretary of State as to furnishing forms of returns, certificates, directions and advice to the Ordinaries with reference to holding elections and for other purposes, be and the same is hereby repealed in its entirety.

Section 3

That in lieu of paragraph 7 of said Section 40-601 of the Code of Georgia of 1933 a new paragraph to be known as paragraph 7 is hereby enacted to read as follows: "The Secretary of State shall furnish each Ordinary of the State the Form of official ballot, all blank forms, including tally sheets, blank lists of voters, forms of returns, certificates and directions to be used in all elections for United States Senate, Governor, Electors of President and Vice-President of the United States, Representatives to Congress, Secretary of State, State Treasurer, Comptroller General, Attorney Gen-

eral, State Superintendent of Schools, Supreme Court of Appeals, Judges of the Superior Court, Solicitor General, Public Service Commission, Commissioner of Labor, Members of the General Assembly, and County Officers. The Secretary of State shall certify to the respective Ordinaries the names of all candidates for national and state offices who have qualified as such as provided in Section 34-1904 of the Code of Georgia and in case there are one or more persons purporting to represent the same political party or candidate it shall be the duty of the Secretary of State to determine such an issue. The Ordinaries of the respective counties shall not be required to add any other names for national and state offices on the official ballot except upon certificate of the Secretary of State.

7A. In any party polling less than 150,000 votes in Georgia in the last preceding general election for President of the United States, where contest exists as to the legal Delegates to a National Convention at which a nomination of candidate for the President of the United States is to be made, it shall be the duty of the Secretary of State to determine the issue and to certify the names of the legally elected delegates to the Secretary of the National Committee of the Party interested.

7B. The Secretary of State shall provide and keep on hand a sufficient quantity of self sealing envelopes of uniform appearance and suitable size, and a sufficient quantity of any of the forms above specified for use in the elections aforesaid. He shall furnish the respective Ordinaries all of such forms as may be necessary, and they shall furnish all such forms as may be necessary to the Justices of the Peace at least five days before election day, and on failure to do so the Ordinaries shall be subject to a fine not exceeding $100.00."

Section 4

All laws and parts of laws in conflict herewith be and the same are hereby repealed.

FRANK C. GROSS,
President of the Senate

EXHIBIT A (Page 6)

MRS. HENRY W. NEVIN,
Secretary of the Senate

ROY V. HARRIS,
Speaker of the House of Representatives

P. T. McCUTCHEN, JR.,
Clerk of the House of Representatives.

APPROVED ELLIS ARNALL,
Governor

This 1st day of February, 1946.

I, John B. Wilson, Secretary of State of the State of Georgia, do hereby certify that the foregoing is a true and correct copy of Act No. 632 of the 1946 General Assembly, as the same appears on file in this office.

This 11th day of February, 1946.

JOHN B. WILSON (signed)
Secretary of State.

EXHIBIT B (Page 1)

CONSOLIDATED VOTE IN STATE DEMOCRATIC PRIMARY HELD JULY 17, 1946

County	Popular and (unit) vote for Governor			
	James V. Carmichael	Hoke O'Kelley	E. D. Rivers	Eugene Talmadge
Appling	1097	33	443	2305 (2)
Atkinson	256	39	1026 (2)	442
Bacon	277	41	693	1317 (2)
Baker	47	11	348	647 (2)
Baldwin	2790 (4)	26	579	2162
Banks	545	39	213	1280 (2)
Barrow	1667	93	286	1803 (2)
Bartow	2631 (4)	98	546	2292
Ben Hill	1268	29	256	1643 (2)
Berrien	358	20	1300 (2)	889
Bibb	12305 (6)	241	1305	8222
Bleckley	575	8	192	1794 (2)
Brantley	125	13	714 (2)	649
Brooks	914	85	600	1440 (2)
Bryan	271	12	211	1030 (2)
Bullock	2627	87	406	3253 (4)
Burke	1229	36	99	1379 (4)
Butts	1076 (2)	42	106	935
Calhoun	353	35	292	579 (2)
Camden	699 (2)	13	412	680
Candler	686	16	195	1163 (2)
Carroll	3219 (4)	154	305	2626
Catoosa	1020 (2)	20	248	577
Charlton	521 (2)	28	311	47
Chatham	17679	280	238	21308 (6)
Chattahoochee	61	1	7	196 (2)
Chattooga	2334 (2)	132	538	1503
Cherokee	1668	99	151	2666 (2)
Clarke	4521 (4)	107	811	1995
Clay	350	6	35	407 (2)
Clayton	1264	115	263	1717 (2)
Clinch	110	9	1143 (2)	437
Cobb	8274 (4)	161	348	2950
Coffee	955	75	1392	2865 (4)
Colquitt	2646	87	667	3790 (4)
Columbia	418	12	95	683 (2)
Cook	606	42	949 (2)	816
Coweta	2995 (4)	124	291	1304
Crawford	246	8	81	1049 (2)
Crisp	977	35	783	2475 (2)

EXHIBIT B (Page 2)

Popular and (Unit) Vote for Governor

County	James V. Carmichael	Hoke O'Kelley	E. D. Rivers	Eugene Talmadge
Dade	83	4	1408 (2)	75
Dawson	58	10	430	840 (2)
Decatur	1490	111	600	2207 (4)
DeKalb	17625 (6)	599	1017	7529
Dodge	1191	42	1360	3064 (2)
Dooly	1202	46	98	1417 (2)
Dougherty	4422 (4)	72	549	2380
Douglas	1355	65	139	1423 (2)
Early	990	51	418	1754 (2)
Echols	2	0	347 (2)	286
Effingham	480	32	123	1457 (2)
Elbert	1727	48	412	2205 (2)
Emanuel	1562	41	802	2987 (4)
Evans	606	45	169	1093 (2)
Fannin	969 (2)	28	123	317
Fayette	683	66	143	1249 (2)
Floyd	5117 (6)	193	1604	4253
Forsyth	1040	74	72	1417 (2)
Franklin	1284	60	687	1863 (2)
Fulton	58193 (6)	2048	3239	21070
Gilmer	853	17	58	1364 (2)
Glascock	91	9	150	904 (2)
Glynn	3925 (4)	164	929	1282
Gordon	1988 (2)	64	181	1609
Grady	1098	53	962	1611 (2)
Greene	1525 (2)	36	243	1403
Gwinnett	3126	336	413	3548 (4)
Habersham	1921 (2)	169	338	1460
Hall	4340 (4)	211	439	3748
Hancock	1287 (2)	21	67	956
Harrison	1051	66	456	1892 (2)
Harris	873	24	62	893 (2)
Hart	1172	59	423	1936 (2)
Heard	586	24	355	862 (2)
Henry	1873 (2)	112	197	1480
Houston	767	48	187	1414 (2)
Irwin	664	28	180	1370 (2)
Jackson	2087 (2)	92	435	1748
Jasper	779 (2)	30	48	749
Jeff Davis	562	26	140	1455 (2)
Jefferson	863	49	237	1872 (2)
Jenkins	898	17	90	1001 (2)

EXHIBIT B (Page 3)

	Popular and (Unit) Vote for Governor			
	James V. Carmichael	Hoke O'Kelley	E. D. Rivers	Eugene Talmadge
Johnson	459	19	650	1588 (2)
Jones	615	15	155	950 (2)
Lamar	1230 (2)	30	68	964
Lanier	47	0	1226 (2)	66
Laurens	2929	53	637	4249 (4)
Lee	154	6	66	540 (2)
Liberty	1328 (2)	11	364	720
Lincoln	125	27	190	790 (2)
Long	366	7	512	812 (2)
Lowndes	2372	127	2616 (4)	1105
Lumpkin	534	42	393	994 (2)
Macon	863	18	17	1204 (2)
Madison	478	26	770	1614 (2)
Marion	443	17	52	707 (2)
McDuffie	940	37	93	1433 (2)
McIntosh	848 (2)	12	227	514
Meriwether	2001	38	167	2018 (4)
Miller	179	11	334	1155 (2)
Mitchell	888	70	422	2261 (4)
Monroe	826	43	171	1466 (2)
Montgomery	532	20	272	1209 (2)
Morgan	1410 (2)	37	64	960
Murray	825	23	116	891 (2)
Muscogee	8691 (6)	75	323	8264
Newton	3052 (2)	136	179	2193
Oconee	790	25	113	1210 (2)
Oglethorpe	534	28	297	1544 (2)
Paulding	678	42	992	1696 (2)
Peach	963	34	55	1134 (2)
Pickens	567	57	132	1169 (2)
Pierce	343	35	677	1525 (2)
Pike	765	29	49	967 (2)
Polk	2835 (4)	118	836	2391
Pulaski	759	23	98	954 (2)
Putnam	747	27	76	881 (2)
Quitman	220	2	14	362 (2)
Rabun	1014	42	457	1113 (2)
Randolph	1020	19	63	1079 (2)
Richmond	9334 (6)	643	529	6000
Rockdale	637	44	299	741 (2)
Schley	354	10	22	290 (2)
Screven	1015	61	134	1825 (2)

EXHIBIT B (Page 4)

County	James V. Carmichael	Hoke O'Kelley	E. D. Rivers	Eugene Talmadge
	Popular and (Unit) Vote for Governor			
Seminole	733	5	202	967 (2)
Spalding	4181 (4)	130	927	2409
Stephens	1529 (2)	86	254	1293
Stewart	413	22	43	690 (2)
Sumpter	1401	80	169	1696 (4)
Talbot	551 (2)	8	51	546
Taliaferro	803 (2)	13	108	385
Tattnall	569	62	615	2550 (2)
Taylor	726	38	99	1330 (2)
Telfair	276	17	115	2775 (2)
Terrell	846	40	88	1188 (2)
Thomas	2406	148	1113	2744 (4)
Tift	1931	72	672	2295 (2)
Toombs	976	27	403	2365 (2)
Towns	128	2	386 (2)	76
Treutlen	270	19	215	1314 (2)
Troup	5091 (6)	92	540	2080
Turner	687	59	370	1490 (2)
Twiggs	616	6	152	1072 (2)
Union	648	18	116	762 (2)
Upson	2618 (4)	47	417	2149
Walker	2157 (4)	73	1034	1484
Walton	2123	149	503	2201 (2)
Ware	3197 (4)	121	1247	2468
Warren	450	23	32	879 (2)
Washington	1443	48	279	2686 (4)
Wayne	889	49	530	1692 (2)
Webster	137	12	45	594 (2)
Wheeler	689	16	72	793 (2)
White	942 (2)	36	474	867
Whitfield	2422 (4)	93	973	2010
Wilcox	347	28	816	1595 (2)
Wilkes	1323	83	282	1353 (2)
Wilkinson	275	20	534	1410 (2)
Worth	813	75	208	2208 (4)
Total Popular Vote	313,389	11,758	69,489	297,245
Total (Unit) Vote	146	0	22	242
No. Counties	44	0	10	105

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 532

MRS. ROBERT LEE TURMAN AND CULLEN B. GOSNELL,

Appellants,

vs.

J. LON DUCKWORTH, AS CHAIRMAN OF THE GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EUGENE COOK,
Attorney General of Georgia;
VICTOR DAVIDSON,
Assistant Attorney General of Georgia;
C. E. GREGORY, JR.,
Assistant Attorney General of Georgia;
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B. D. MURPHY,
Counsel for Appellees.

INDEX

Subject Index

	Page
Statement opposing jurisdiction and motion to dismiss or affirm	1

Table of Cases Cited

Antoni v. *Greenhow*, 107 U. S. 760, 27 L. Ed. 468	8
Ayers, In re, 123 U. S. 443, 31 L. Ed. 216	8
Blackman v. *Stone*, 17 Fed. Supp. 102, 300 U. S. 641, 81 L. Ed. 856	6
Breedlove v. *Suttles*, 302 U. S. 277, 82 L. Ed. 252	5
Cargile v. *New York Trust Co.*, 67 F. (2d) 585	8
Cherokee Nation v. *Georgia*, 5 Pet. 1	9
Colegrove v. *Green*, 90 L. Ed. 1242	5
Cuningham v. *Macon & Brunswick R. R.*, 109 U. S. 446, 27 L. Ed. 992	8
Generic v. *Rutter*, 265 U. S. 388, 68 L. Ed. 1068	9
Georgia v. *Stanton*, 6 Wal. 50, 18 L. Ed. 721	9
Giles v. *Harris*, 189 U. S. 475, 47 L. Ed. 909	5
Great Lakes Dredge & Dock Co. v. *Huffman*, 319 U. S. 293, 87 L. Ed. 1407	10
Hagood v. *Southern*, 117 U. S. 52, 29 L. Ed. 805	8
Jones v. *Montagu*, 194 U. S. 147, 48 L. Ed. 913	6
Lane v. *Wilson*, 307 U. S. 268, 83 L. Ed. 1281	5
Louisiana v. *Jumel*, 170 U. S. 711, 27 L. Ed. 448	8
McPherson v. *Blocker*, 148 U. S. 1, 36 L. Ed. 869	5
Mills v. *Green*, 159 U. S. 659, 40 L. Ed. 293	6
Minor v. *Happersett*, 21 Wall. 162, 33 L. Ed. 627	5
Missouri v. *Fiske*, 290 U. S. 18, 27 L. Ed. 145	9
Monaco v. *Mississippi*, 292 U. S. 313, 78 L. Ed. 1282	9
New York Trust Co. v. *Cargile*, 292 U. S. 625, 78 L. Ed. 148	8
Pennoyer v. *McConnaughy*, 140 U. S. 1, 35 L. Ed. 363	8
Sawyer, In re, 124 U. S. 200, 31 L. Ed. 402	5

	Page
State of New York, Ex Parte, 256 U. S. 490, 65 L. Ed. 1057	8
Taylor v. *Beckham,* 178 U. S. 548, 44 L. Ed. 1187	5,9
Walton v. *House of Representatives,* 265 U. S. 490, 68 L. Ed. 1116	5
Worchester Trust Co. v. *Riley,* 302 U. S. 292, 82 L. Ed. 268	9
Zarbrough, Ex parte, 116 U. S. 651, 28 L. Ed. 274	5

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 3013

MRS. ROBERT LEE TURMAN AND CULLEN B. GOSNELL,

Plaintiffs,

vs.

J. LON DUCKWORTH, AS CHAIRMAN GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE; MISS GRACE CANNINGTON, AS SECRETARY GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE; THE STATE DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA; BEN. W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA,

Defendants.

STATEMENT OF APPELLEES OF MATTERS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

MOTION TO DISMISS OR AFFIRM

Now come the appellees, pursuant to Rule 12 of the Supreme Court of the United States, within fifteen days from the service of the notice of appeal and appellants' statement as to jurisdiction, and file this their statement of

matters making against the jurisdiction of the Supreme Court of the United States to review the order or decree appealed from, and, as a part thereof, their motion to dismiss or affirm, and show:

1. The record fails to present a substantial federal question. The complaint attacked as violative of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States, a law of the State of Georgia establishing a county unit system for nominating party candidates for State offices. The gist of the law is that if any political party shall elect to hold a party primary to nominate candidates for State offices, the candidate receiving the greatest number of votes in any county shall be deemed to have carried that county and shall be entitled to the "unit" vote of such county in determining the nominee. Each county has two unit votes for each member in the lower House of the General Assembly. Representation in the General Assembly is fixed by the State Constitution. To be nominated for Governor, a candidate must receive a majority of all the county unit votes. If no candidate receives a majority of the county unit votes, a second primary, or run-off, between the two highest candidates is held. The candidate receiving the majority of the county unit votes in the second primary is entitled to the nomination. If they are tied in unit votes (which is possible only if the vote in one or more counties is equally divided) the one having the greatest popular vote is the nominee. With respect to offices other than Governor and United States Senator, a plurality of county unit votes nominates.

Appellants complain that the primary law deprives them of equal protection of the law, in violation of the Fourteenth Amendment, because they live and vote in populous counties, in which a heavy vote was polled in the primary

of July 17, 1946, but that each of these counties has only six unit votes, whereas other counties with disproportionately less voters and disproportionately less population, have two unit votes.

The primary was held July 17, 1946. In the primary a candidate for Governor carried 105 counties of a total of 159 and received a substantial majority of all the county unit votes (242 of a total of 410) but less than a plurality of the popular vote. Appellants voted for another candidate who received a plurality of the popular vote (313,389 as against 297,245 for the successful candidate), but did not receive a majority of the popular vote (other candidates received 81,247 popular votes) and had only 146 unit votes of the total of 410. Of the total popular vote received by the candidate of appellants, 76,816 were in the two counties in which appellants live. Outside of these counties, the successful candidate, under the county unit plan, received 32,075 more votes than the candidate of appellants.

The original complaint sought to enjoin the Chairman and Secretary of the State Democratic Executive Committee from certifying the successful candidate under the county unit rule as the Democratic nominee for Governor.

But the complaint was filed August 8, 1946, after this certification had been made to the Secretary of State on August 5, 1946.

The Georgia law requires that candidates for State offices qualify with the Secretary of State in person, or through the proper authorities of the party nominating them, ninety days before the general election, which is to be held this year on November 5th. The certification of the Democratic candidate for Governor was filed one day before the time would have expired.

The original complaint also sought to enjoin the Secretary of State from furnishing the official ballot to the ordinaries of the various counties.[1]

The Georgia law requires the Secretary of State to furnish these ballot forms to the ordinaries in sufficient time for the ordinaries to have ballots printed at least seventy (70) days before the general election.

No restraining order was granted upon the filing of the original complaint.

The Secretary of State mailed the ballot forms out to the ordinaries on August 12, 1946, just fourteen days before the expiration of the period within which the ordinaries were required to have all the ballots printed and ready for distribution.

Appellants amended or sought to amend their original complaint. The amendment alleged that since the filing of the original complaint the time within which candidates might qualify to be voted on in the general election of November 5, 1946, had expired (in fact, the time had expired August 6th, before the complaint was filed on August 8th) and the only candidate who had been qualified was the Democratic nominee under the county unit system. They prayed that if the Secretary of State had prepared and distributed the official ballot for the November general election and that election should be held with the name of the candidate nominated under the county unit system as the only Democratic candidate for Governor entered on the ballot, the Secretary of State be enjoined from causing the returns of the general election for Governor to be laid before the General Assembly when it meets.

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[1] The ordinary is a constitutional county officer, who supervises general elections, appoints the managers at each county precinct, and has the duty of providing all necessary forms. He has the ballots printed following the form sent to him by the Secretary of State as to state offices and adding, on the same ballot, candidates for local offices.

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The cause was heard before a three-judge District Court on August 16, 1946. An order denying an interlocutory injunction was entered August 24, 1946, and filed August 26, 1946.

Appellees contend that no substantial federal question is involved because the right of the appellants to vote in a primary for the nomination of party candidates for State offices does not arise under the Constitution and laws of the United States, but under the laws of the State. Cases believed to sustain this contention are:

Minor v. *Happersett*, 21 Wall. 162, 170; 33 L. Ed. 627, 629;

Ex parte Zarbrough, 110 U. S. 651, 664, 665, 28 L. Ed. 274, 275;

McPherson v. *Blocker*, 148 U. S. 1, 37, 38, 36 L. Ed. 869, 878;

Guinn v. *United States*, 238 U. S. 347, 59 L. Ed. 1340, 1346;

Breedlove v. *Suttles*, 302 U. S. 277, 82 L. Ed. 252, 256.

2. The rights asserted by the appellants are purely political, and the questions involved are purely political questions. Whether or not the complaint presents a justiciable controversy, equity is without jurisdiction to enforce a purely political right. This is especially true of federal courts of equity.

Cases sustaining this contention are:

In re: Sawyer, 124 U. S. 200, 31 L. Ed. 402;

Walton v. *House of Representatives*, 265 U. S. 490, 68 L. Ed. 1116;

Taylor v. *Beckham*, 178 U. S. 548, 570, 44 L. Ed. 1187, 1195;

Giles v. *Harris*, 189 U. S. 475, 47 L. Ed. 909;

Lane v. *Wilson*, 307 U. S. 268, 83 L. Ed. 1281;

Colegrove v. *Green*, —— U. S. ——, 90 L. Ed. 1242.

The rule that a federal court of equity is without jurisdiction of political questions, or to enforce political rights, is so firmly established that the Supreme Court ought not to allow an appeal presenting such a question.

The amendment of appellants, hereinafter referred to, but emphasizes the political nature of the questions presented.

3. No effective relief could now be granted to appellants by this Court or by the trial court, because the only prayer left in the complaint relates to a subject-matter of which the federal courts are without jurisdiction and seeks relief they are without power to grant.

All of the questions presented by the original complaint were moot at the time of the hearing before the statutory three-judge court. The original complaint sought to enjoin the Chairman and Secretary of the State Democratic Executive Committee from certifying the result of the July 17th primary to the Secretary of State. This certification had been made on August 5, 1946, and the complaint was filed August 8, 1946. Manifestly the court could not restrain an act which had been done before the suit was filed.

The complaint also sought to enjoin the Secretary of State from sending out the ballot forms to the ordinaries. This had been done, as required by a state law which is concededly valid, when the case was heard.

Consequently every question presented by the original complaint had become moot in the trial court and is now moot. No relief can be granted appellants with respect to these questions.

Mills v. *Green*, 159 U. S. 659, 40 L. Ed. 293;

Blackman v. *Stone*, 17 Fed. Supp. 102, 300 U. S. 641, 81 L. Ed. 856;

Jones v. *Montagu*, 194 U. S. 147, 48 L. Ed. 913.

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The only thing left in the case is the prayer of the amendment which seeks to enjoin the Secretary of State from laying before the General Assembly at its next session the returns of the general election for Governor to be held November 5, 1946.[2]

The complaint, in so far as it proceeded against the Secretary of State, is in purpose and effect a suit against the State of Georgia. He is sued in his official capacity. It is not alleged that the Secretary of State is proceeding under any law alleged to be unconstitutional or in an unconstitutional manner under a valid law. The Primary Act of 1917, which alone is alleged to be unconstitutional, imposes no duty upon the Secretary of State. In receiving certifications of nominees of parties or notices of candidacy of other candidates, he does not act under the Act of 1917, but under other statutes which are not challenged. He has no duty to determine the validity or propriety of the certification by the proper officials of a party, and no duty to determine any controversy with respect thereto, save in a case where two or more persons seek to qualify as nominee of the same party. In that case, he is to determine the issue, but such is not the case here.

The duty of the Secretary of State to lay before the Senate the returns of the general election for Governor arises under the Constitution of Georgia, which is not attacked, but is admittedly valid. In so acting, the Secretary of State is the mere agent of the General Assembly. The election managers seal the returns and send them to the Secretary of State, addressed to the President of the Senate and Speaker of the House of Representatives. The

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[2] The amendment was filed before the hearing, but was never allowed. At the hearing appellees objected to the amendment. The objections were heard and decision reserved. There having been no ruling on the amendment in the court below, questions presented by it are not before the Supreme Court for determination.

Secretary of State retains the returns, without opening them, and must cause them to be laid before the Senate at its next session, in order that the two houses of the General Assembly in joint session may open and publish the returns and declare the result. If, as a result of the election, no candidate receives a majority of the votes cast, then the General Assembly elects a Governor from the two highest, a majority of the members present being necessary to a choice. Incidentally this election is under the "County Unit" Plan.[3]

In so far as the complaint proceeds against the Secretary of State, both with respect to the relief sought in the original complaint and that sought in the amendment, it is in purpose and effect a suit against the State, because the Secretary of State, in all that he has done or may do acts under valid State laws, which are not attacked, and therefore represents the State in action and liability. See in this connection:

In re: Ayers, 123 U. S. 443, 31 L. ed. 216;
Louisiana v. *Jumel,* 170 U. S. 711, 27 L. ed. 448;
Antoni v. *Greenhow,* 107 U. S. 760, 27 L. ed. 468;
Cunningham v. *Macon & Brunswick R. R.,* 109 U. S. 446, 27 L. ed. 992;
Hagood v. *Southern,* 117 U. S. 52, 29 L. ed. 805;
Pennoyer v. *McConnaughy,* 140 U. S. 1, 35 L. ed. 363;
Cargile v. *New York Trust Co.,* 67 F. (2) 585;
New York Trust Co. v. *Cargile,* 292 U. S. 625, 78 L. ed. 148;
Ex Parte State of New York, 256 U. S. 490, 65 L. ed. 1057;

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[3] The eight most populous counties each have three representatives, the thirty next most populous have two representatives each, and the rest of the counties each have one. The county unit vote of each county, under the primary law, is two for each representative.

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Worchester Trust Co. v. *Riley*, 302 U. S. 292, 82 L. ed. 268.

The State is an indispensable party to enable a federal court to grant the relief sought by the amendment, for it is against the State itself that the decree would operate. The State has not consented to be sued, and the Court should, for that reason, decline jurisdiction.

Missouri v. *Fiske*, 290 U. S. 18, 27 L. ed. 145, 150;
Monaco v. *Mississippi*, 292 U. S. 313, 78 L. ed. 1282.

In so far as the complaint seeks to enjoin the Secretary of State from laying the returns of the general election for Governor before the General Assembly, it does not present a justiciable controversy, but calls for the judgment of the court upon purely political questions.

Georgia v. *Stanton*, 6 Wall. 50, 18 L. ed. 721;
Taylor v. *Beckham*, 178 U. S. 549, 44 L. ed. 1187;
Cherokee Nation v. *Georgia*, 5 Pet. 1.

In so far as the complaint seeks to restrain the Secretary of State from laying the returns of the general election before the General Assembly, it seeks, in purpose and effect, to control the action of the General Assembly of Georgia, which is not a party to the suit and cannot be made a party.

The managers of the general election, who conduct it, under the supervision and by appointment of the ordinaries, and the General Assembly, which ascertains and declares the result, are the real actors and representatives of the people with respect to the general election. The duties of the Secretary of State are purely clerical. He is a mere repository of the returns until the legislature meets. The General Assembly cannot be restrained by enjoining him.

Generic v. *Rutter*, 265 U. S. 388, 68 L. ed. 1068.

We had as well try to keep the Court from considering a case by enjoining the Clerk from laying the record before it.

4. The declaratory relief prayed for cannot be granted, because the case is not one appropriate for the grant of equitable relief.

Great Lakes Dredge & Dock Co. v. *Huffman*, 319 U. S. 293, 87 L. ed. 1407;
Colegrove v. *Green, supra.*

WHEREFORE, appellees respectfully submit this statement, showing that the questions upon which the decision of this Court depend are so unsubstantial as not to need further argument or further consideration of this Court, and appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment by the District Court of the United States for the Northern District of Georgia.

This, September 26, 1946.

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IN THE

SUPREME COURT OF THE UNITED STATES

MRS. ROBERT LEE TURMAN and CULLEN B. GOSNELL

Appellants

VS.

J. LON DUCKWORTH, as Chairman Georgia State Democratic Executive Committee;

MISS GRACE CANNINGTON, as Secretary Georgia State Democratic Executive Committee;

THE STATE DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA, an unincorporated association; and

BEN W. FORTSON, JR., as Secretary of State of Georgia.

Appellees

Number 532

October Term 1946

MOTION TO ADVANCE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Appellants in the above stated case respectfully make this motion to advance hearing and argument of this appeal which is now pending to the end that it be assigned on the calendar of the Court for the earliest possible date in the October, 1946 term. In support of the motion the movants show:

I.

This case is on direct appeal to this Court from an order of a three judge Court convened by a District Judge under the provisions of Judicial Code, Section 266, amended, U.S.C.A. Title 28, Section 380, denying an interlocutory injunction.

2.

The complainants, citizens and qualified voters in a class action in equity brought their complaint in the District Court for the Northern District of Georgia against the State Democratic Executive Committee, its Chairman, its Secretary and the Secretary of State for Georgia. The relief prayed for was that a statute of the State of Georgia providing for primary elections and setting up a "county unit" system of counting or evaluating votes should be declared invalid and unconstitutional as violative of the equal protection clause of the 14th Amendment to the Constitution of the United States and that State and party officials named as defendants be restrained and enjoined from taking certain steps to give effect to the alleged results of a State wide primary for the nomination of candidates for Governor and other State officers held under the provisions of this Statute in Georgia on July 17, 1946.

3.

Under the provisions of the Constitution of the State of Georgia "electors" who shall be entitled to vote for members of the General Assembly and State officers in General Election are defined and plaintiffs are among that class of electors. The State Constitution also provides that the Governor shall be elected in a General Election by a majority of the votes of all electors of the State voting in a State wide general election. There is no other classifica-

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tion of voters or electors provided in the Constitution.

4.

The attack on the statute was that by it the General Assembly had set up a scheme under which a candidate in any primary election securing a plurality of votes in any county should be deemed to have carried that county, and that the "unit" vote of each of eight counties of the state should be counted as six and in each of thirty counties shoulr be counted as four and each of the remaining one hundred twenty-one counties should be counted as two, this representing two unit votes for each representative a county had in the General Assembly. The complainants alleged that they and others similarly situated living in the more populous counties having six unit votes were grossly discriminated against in their enjoyment of the right of franchise provided by and derived from their State Constitution and were thus deprived of equal protection of the laws since under the statute their votes were counted or valued on a basis grossly disproportionate to that of votes in other counties, particularly those in the smaller counties having two unit votes, where in the instance of one county a vote of one elector would count 106 times that of a single vote of the class of one of the plaintiffs in a six unit county, and so on over the whole state in varying degrees of discrimination, resulting in virtually depriving plaintiffs of their entire right of franchise.

5.

It was further alleged that in the primary held on July 17, 1946 the candidate who received a majority of the county unit vote did not receive a majority or plurality of the popular vote as did another candidate, but nevertheless under the terms of the statute alleged to be violative of the Constitution of the United States would be certified to the Secretary of

State as the nominee of the Democratic Party and unless the Secretary of State was restrained, as prayed, the name of such candidate would be placed on State ballots for General Election to be hold on November 5, 1946 as the duly nominted candidate for Governor.

6.

The District Judge to whom the complaint was presented had denied temporary restraining order and by the time the three-Judge Court had been convened to hear the cause on August 16, 1946 the Secretary of State had already placed on the ballots to be used in the General Election the name of this candidate alleged to have been so illegally nominated. It then also appeared that under other valid provisions of law the time for qualifying and filing as candidate for Governor in the General Election had expired and no other name had been or could be entered on ballots for the coming General Election. Prior to the hearing before the three-Judge Court plaintiffs amended their complaint showing the above stated facts and prayed that in addition to other relief the Secretary of State be enjoined from transmitting the name of the candidate so selected to the General Assembly, which will be done under the provisions of the State Constitution when the General Assembly convenes on January 13, 1947, unless injunction is granted.

7.

Upon hearing before the three-Judge Court on August 16, 1946, interlocutory injunction was denied by order, judgment and opinion entered on August 24, 1946, from which appeal was promptly taken by plaintiffs-appellants, said appeal being filed in this Court on September 23, 1946.

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8.

Unless argument and decision of this Court can be had, and an interlocutory injunction, as prayed, granted on or before January 13, 1947, the Secretary of State of the State of Georgia will transmit to the General Assembly the name of the candidate receiving the majority vote in the general election (who of necessity will be the candidate nominated under the county unit rule in the primary election held July 17, 1946), and such candidate will be, by the General Assembly, inducted into office January 14, 1947, rendering moot the questions as to injunctive relief prayed for by appellants. It is therefore submitted that the case here pending should be advanced for argument ahead of what might be its normal assignment by reason of the date of its filing.

9.

This motion is made in accordance with Rule 20, Paragraph 3 of the Rules of this Court.

WHEREFORE movants pray that appropriate action be taken which will permit the earliest possible presentation of argument to this Court.

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Service of the foregoing MOTION TO ADVANCE is hereby acknowledged. Copies received.

This 1st day of October, 1946.

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1946

No. 532

MRS. ROBERT LEE TURMAN and CULLEN B. GOSNELL,

Appellants,

v.

J. LON DUCKWORTH, as Chairman of the Georgia State Democratic Executive Committee, et al.

Appellees.

Appeal from the District Court of the United States for the Northern District of Georgia

PETITION FOR REHEARING

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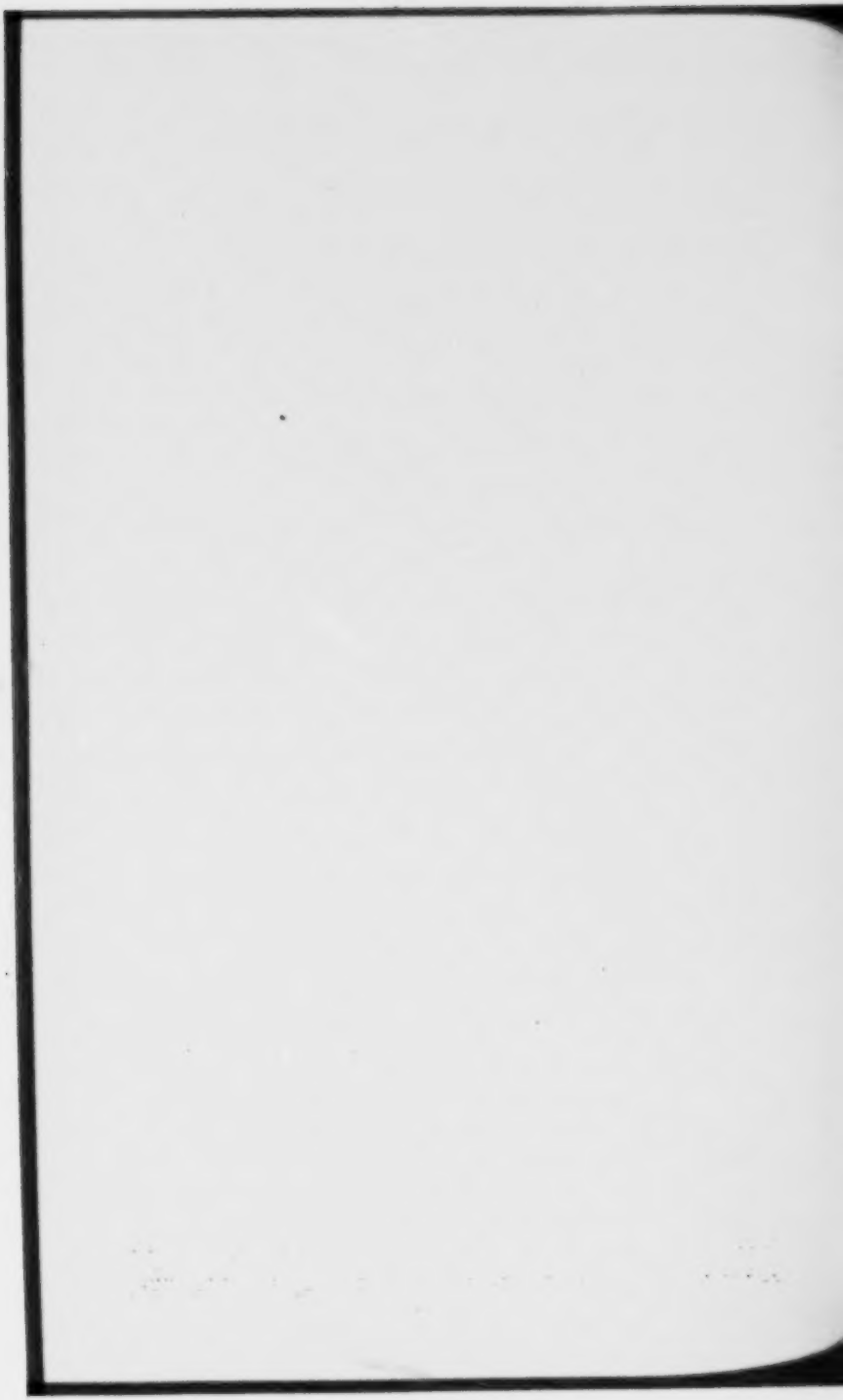

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OCTOBER TERM, 1946

NO. 532

MRS. ROBERT LEE TURMAN and
CULLEN B. GOSNELL,
Appellants

v.

J. LON DUCKWORTH, as Chairman of the
Georgia State Democratic Executive
Committee, et al.
Appellees

PETITION FOR REHEARING

To the Supreme Court of the United States:

Now come the Plaintiffs-Appellants in the above stated case and present this their petition for a reconsideration by the Court of its action in dismissing their appeal to this Court, and respectfully submit the following reasons:

I.

The Supreme Court in this case has rendered a most remarkable ruling PER CURIAM. It has disposed, on the merits, of one of the most important legal controversies presented to it in its history without according protesting litigants the opportunity of a hearing. It has done so in a case in which there is no question as to its technical jurisdiction. We mean by this that the case was one which was with obvious propriety and authority filed in a Federal Court asserting that a State statute violated specified provisions of the Federal Constitution and adverse judgment had been rendered against petitioners by a three-judge Court duly convened under appropriate Federal statutes. The right of an appeal to the United States Supreme Court from that judg-

ment was likewise accorded to the losing parties by Federal statute.

An adjudication had been made in the lower Court that the statute complained of did not violate the Federally protected rights of the protesting litigants and also that they were not entitled to interlocutory injunctive relief. Their prayer for declaratory judgment was also denied. In the opinion filed with the judgment it had been said by the three-Judge Court.

> " . . . in order that all questions may be ripe for consideration in the Appellate Court if necessary, we will briefly say that on the ultimate merits we do not think the State of Georgia has been shown to have deprived the plaintiffs of the equal protection of the laws."

II.

It is submitted that there is no case in the history of the United States Supreme Court which in any respect conclusively rules the questions made in the present cause. Yet this Court has by a preliminary inquiry on its own jurisdiction determined the merits of the cause now presented and which involve grave Constitutional issues without even having had the benefit of briefs in support of appellants' contentions.

III.

The case, while in no respect controlled by, was nevertheless closely related to that of *Colegrove v. Green*, 327 U. S. ....., 66 S. Ct. 1198, 90 L. Ed. 1242, in which application for rehearing and reargument was pending in the Court and in which simultaneous judgment was rendered. The *Colegrove* case had been fully argued in the Court, although in a Court reduced in number. The judgment on the main question was a three to three decision, the seventh Justice agreeing that a justiciable controversy was presented, but believing that due to practical considerations which had impact upon the State government involved, threw the weight of his judgment with the three members of the Court whose opinion he disagreed with. The Colegrove case was not, as is the present case,

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grounded on relief to individuals from private wrongs, but it did afford an occasion for a full examination of the general subject of how far courts will go in protecting political rights. The present case more than any in the history of the Court presents the question of whether equity in addition to aid by declaratory judgment will protect citizens in their right of franchise, for while *Smiley v. Holm*, 285 U. S. 355, 52 S. Ct. 397, 76 L. Ed. 795 holds favorably to appellants here, that particular question was not so fully dealt with.

IV.

It is assumed that the function of a motion such as this does not embrace repetition of factual data or the claims of appellants. It is merely mentioned that they present the most grave constitutional challenges to State legislation.

V.

It is not in any way suggested that the questions were not properly raised or presented. Nor is it questioned that solemn adjudication in the lower Federal Court was made upon each of these questions.

Two things are open for consideration: (1) Whether the results of an election held under an unconstitutional law — which results have not yet been consummated but still leave official duties to be performed by one of the respondents against whom relief is prayed — will be enjoined. (2) Whether, irrespective of the grant of injunctive relief, a declaratory judgment may be had condemning the statute in order to prevent future discrimination.

VI.

These questions have been discussed in a brief on the merits of the case, which is attached hereto and sufficient copies under the rules of the Court filed herewith, and which this Court has not yet had the opportunity of examining.

VII.

It would seem startling and shocking that in a field of the law which is so uncertain such a vital question would be con-

clusively determined without (1) full opportunity for the litigants to be heard in all of the ways prescribed by law, one of which is by oral argument in the Court, and (2) careful examination of the case on the merits.

VIII.

The foregoing is particularly true in the light of recent sharp divisions in the Court where on main questions of principle involved in this case there has been no conclusive determination. The wide and historic implications involved if the Court should adhere to its present disposition of this case might and would most likely show up in many parts of the nation in the belief, whether a mistaken one or not, that the Court had by its action placed its approval on the sort of discrimination here of record, thus giving encouragement to and promotion of the same evils in many other states of the union.

IX.

This Court in its decision, although refusing to note probable jurisdiction, actually dismissed the appeal on the merits. Whether the plaintiffs have requisite standing in the Court is a question going to the merits. In resolving the case against the plaintiffs, the Court dismissed the same on the merits and not for want of any jurisdiction. A case of such public importance should not thus be summarily disposed of.

X.

The Court by its reference to *United States v. Anchor Coal Company*, 239 U. S. 12, has apparently adjudicated that the present case is moot. Yet it is to be remembered that almost all of the issues in the present case are drawn upon whether or not effective relief can be granted, it being contended by appellants that official action yet remains to be performed, which ought to be enjoined, and by appellees that the case has become moot. All of this was true when the lower Court decided the controversy. Its decision was not upon the principle that the case was moot. Nothing has changed since that decision to render it moot. Therefore, it would seem that for this Court to so adjudicate and on the basis of its adjudication to direct dismissal in the lower Court clearly amounts

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to passing upon the very merits of the whole case — and, of course, doing so without a hearing.

WHEREFORE, IT IS RESPECTFULLLY PRAYED that this petition for rehearing and reconsideration be allowed filed, be approved, that the previous judgment of the Court dated October 28, 1946 be withdrawn, that the case be assigned on the calendar for argument, and that it be advanced for early consideration and appropriate judgment.

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COUNSEL FOR THE TWO ABOVE-NAMED PLAINTIFFS-APPELLANTS.

We hereby certify that the foregoing Motion is presented in good faith and not for delay.

Chas. S. Reid
Charles S. Reid

November 9, 1946

W. D. Thomson
W. D. Thomson

Attorneys for the Two above named Appellants.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1946

No. 532

MRS. ROBERT LEE TURMAN and CULLEN B. GOSNELL,

Appellants,

v.

J. LON DUCKWORTH, as Chairman of the Georgia State Democratic Executive Committee, et al.

Appellees.

Appeal from the District Court of the United States for the Northern District of Georgia

BRIEF ON BEHALF OF APPELLANTS

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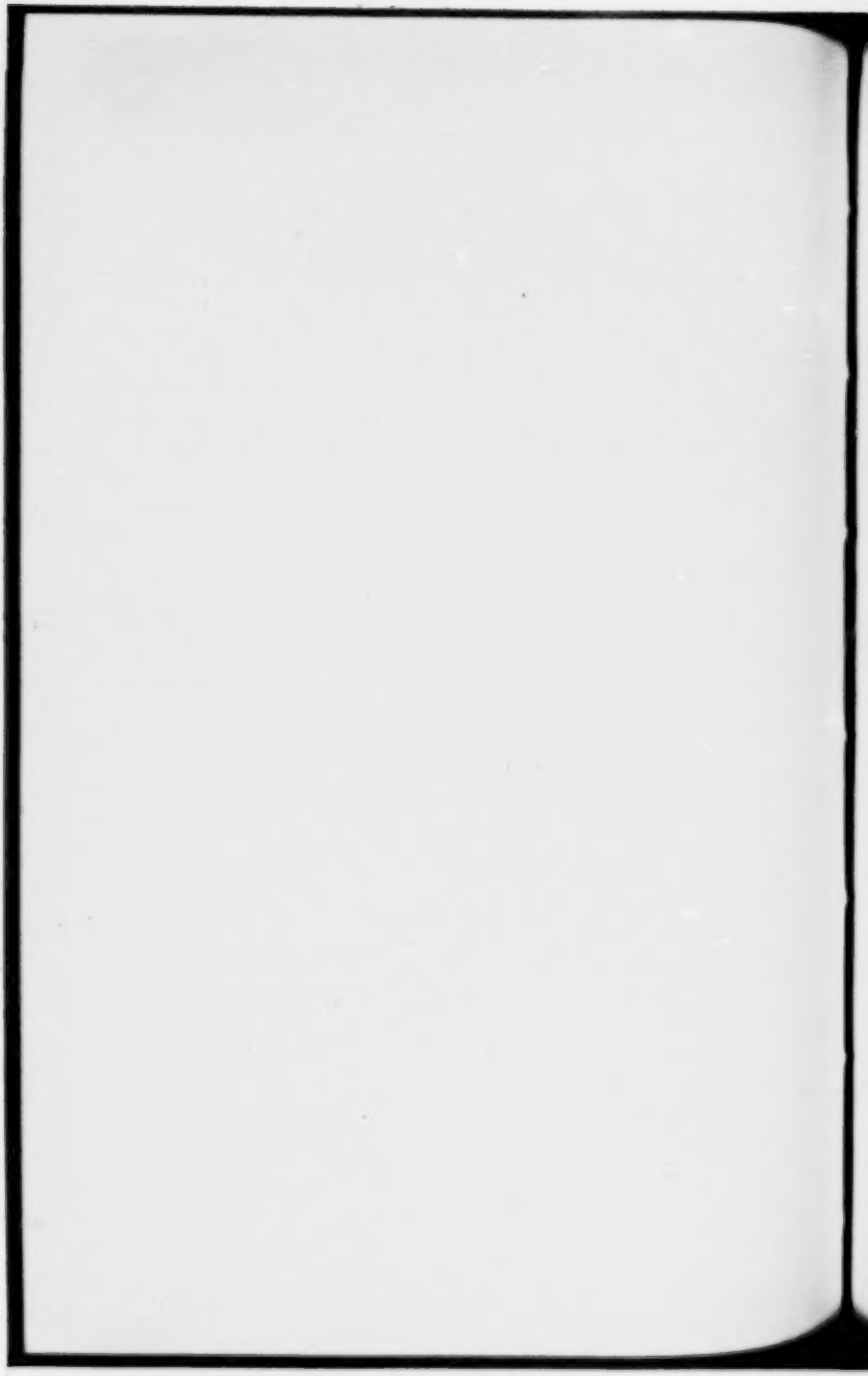

BLEED THROUGH- POOR COPY

SUBJECT INDEX

STATEMENT OF MATTERS INVOLVED:

		Page
1.	Opinion below	1
2.	Jurisdiction of this Court	1
3.	Statement of the Case	1
4.	Specification of Errors	6
5.	The General Nature of Appellants' Claim	7
SUMMARY OF ARGUMENT		8
ARGUMENT		
I.	The District Court had Jurisdiction of the Parties and the Subject Matter in this Cause	10
II.	This Court has Jurisdiction in this Case on this Appeal	11
III.	Under the Provisions of the Constitution of the State of Georgia the Plaintiffs-Appellants have the right to Vote for Governor and other State House Officers in General Elections	11
IV.	Any Classification by Statute even if Allowed by the State Constitution must be upon a Reasonable and Rational Basis and Must not set up Gross Discrimination between Groups or Classes by Counties or other Geographical Areas	16
V.	The Primary Election Governed by the Statute under Attack has been made a Part of the Public Election Process and Machinery of the State; Action Under it is State Action; Nomination in Such a Primary is Tantamount to Election and for the Purpose of Testing Rights of Plaintiffs-Appelants in this Case Such a Primary Must be Treated as "an Election by the People"	20
VI.	The Statute under Attack with its County Unit Plan was Expresaly Designed to Restrict the Suffrage of Voters in the More Populous Counties. It Grossly Discriminates and Operates against them and Deprives them and those in their Class of the Equal Protection of the Laws as Guaranteed by Section I of the Fourteenth Amendment to the Constitution of the United States	22

INDEX (Continued)

Page

VII. While this Case may Concern Political Action it Nevertheless Seeks Protection of Civil Rights. It Involves Private wrongs and not Merely a Public System. Equity has Jurisdiction and the District Court had the Power and Duty to Grant a Temporary and Interlocutory Injection 31

VIII. The District Court as Constituted had the Power and Duty to Declare the Act Complained of Unconstitutional Whether or not Plaintiffs-Appellants were Entitled to Injunctive Relief 41

IX. Plaintiffs-Appellants have no Adequate Remedy at Law by an Action for Damages or Otherwise 43

X. Plaintiffs-Appellants are not Estopped by Their Participation in the Primary Election 43

XI. The Present Action Insofar as it Relates to the Secretary of State is not a "Suit Against the State" 44

XII. It is not too Late to Grant Effective Relief nor Would it be an Improper Exercise of this Court's Power to do so 46

CONCLUSION 48

APPENDIX

Exhibit 1: County Outline Map of Georgia 51

Exhibit 2: Georgia Gubernatorial Primary of July 17, 1946; Population per Unit Vote, for Each County 52

Exhibit 3: Georgia Gubernatorial Primary of July 17, 1946; Popular Votes per Unit Vote, for Each County 53

Exhibit 4: Georgia Gubernatorial Primary of July 17, 1946: How the County Unit System Devalues Certain Votes. One Vote in Chattahoochee County was Worth 106 Votes in Fulton County 54

Exhibit 5: Georgia Gubernatorial Primary of July 17, 1946: Percentage of Population and Unit Votes Received by Each Candidate 55

BLEED THROUGH– POOR COPY

Page

Exhibit 6: Georgia Gubernatorial Primaries of 1932 and 1942: Minimum popular votes required to win 56

Exhibit 7: Georgia Gubernatorial Primaries of 1932-1942: Summaries of Returns 58

TABLE OF CASES

Attorney General v. Suffolk County Commissioners, 224 Mass. 598, 113 N. E. 581 ..... 16, 28, 35

Bell v. Hood, — U. S. — 66 S Ct. 773 — L. Ed. — 39

Boyd v. State of Nebraska, ex rel. Thayer 143 U. S. 135, 12 S. Ct. 375 37

Brewer v. McClellend, 144 Ind. 423, 32 N. E. 299 17

Carroll v. Becker, 285 U. S. 380, 52 S. Ct. 402 76 L. Ed. 807 37

Colegrove, et al. v. Green,— U. S. —, 66 S. Ct. 1198, 90 L. Ed. 1242 ..... 15, 16, 31, 32, 34, 36, 40

Gates v. Long, 172 Tenn. 471, 113 S. W. 2nd 388 ..... 18, 27, 28

Giles v. Harris, 189 U. S. 475, 23 S Ct. 639, 47 L. Ed. 909 36

Great Lakes Dredge & Dock Co. v. Huffman, 319 U. S. 293, 63 S. Ct. 1070, 87 L. Ed. 1407 42

Grovey v. Townsend, 295 U. S. 45, 55 S. Ct. 622, 79 L. Ed. 1292 20

Gulf C. & S. F. Railway Co. v. Ellis, 165 U. S. 150, 17 S. Ct. 255 26

Hall v. Nagel, 154 Fed. 2nd. 931 37

James v. City of Blakely, 143 Ga. 117, 84 S. E. 431, 433 ..... 40, 44

Judice v. Village of Scott, 168 La. 111, 1 U. S. 592 cert. denied 280 U. S. 566, 50 S. Ct. 26, 74 L. Ed. 260 24

King v. Chapman, 62 Fed. Sup. 639, 154, Fed. 2nd. 460 cert. denied 66 S. Ct. 905 ..... 20, 30

Koenig v. Flynn, 285 U. S. 375, 52 S. Ct. 403, 76 L. Ed. 805 37

Lane v. Wilson, 307, U. S. 268, 59 S. Ct. 872, 83 L. Ed. 1281 30

INDEX (Continued)

	Page
Minor v. Happersett, 21 Wall 162, 22 L. Ed. 627, 88 U. S. 162	24
Mitchell v. Wright, 154 Fed. 2nd 924	37
McPherson v. Blacker, 146 U. S. 1, 13 S. Ct. 3, 36 L. Ed. 869	25, 35
Morris v. Parnell, 125 Ind. 281, 25 N. E. 221	16
N. C. & St. L. R. R. v. Wallace, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730	41
Nixon v. Condon, 286 U. S. 73, 52 S. Ct. 484, 76 L. Ed. 984	30
Nixon v. Herndon, 273 U. S. 536, 47 S. Ct. 446, 71 L. Ed. 759	11, 18, 22, 24, 34
People v. Fox, 294 Ill. 263, 128 N. E. 505	21
Public Service Co. of N. Ill. v. Corboy, 250 U. S. 153, 39 S. Ct. 440, 63 L. Ed. 905	46
Quaker City Cab Co. v. Commonwealth of Pennsylvania, 277 U. S. 389, 48 S. Ct. 553, 72 L. Ed. 927	44
Ragland v. Anderson, 125 Ky. 141, 100 S. W. 865	29
Richardson v. McChesney, Sec. of State of Kentucky 218 U. S. 487, 31 S. Ct. 43, 54 L. Ed. 1121	11
Sellers v. Cox, 127 Ga. (2) (56 S. E. 284)6	44
Sherman v. People, 210 Ill. 552, 71 N. E. 618	21
Smiley v. Holm, 285 U. S. 355, 52 S. Ct. 397, 76 L. Ed. 795	11, 36
Smith v. Allwright, 321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 819	21, 30
Smyth v. Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819	46
Snowden v. Hughes, 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497	8, 36
State v. Edwards, 95 W. Va. 599, 122 S. E. 272	25
Sterling v. Constantin, 287 U. S. 378, 53 S. Ct. 190, 77 L. Ed. 375	45
Swafford v. Templeton, 185 U. S. 487, 22 S. Ct. 783, 46 L. Ed. 1005	30

BLEED THROUGH– POOR COPY

INDEX (Continued)

Page

Texas v. Florida, Mass & New York, 306 U. S. 398 59 S. Ct. 563, 83 L. Ed. 817 42

U. S. v. Classic, 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1638 ..... 16, 20

U. S. v. Mosely, 238 U. S. 383, 35 S. Ct. 904, 59 L. Ed. 1355 15

U. S. v. Saylor, 322 U. S. 385, 64 S. Ct. 1101, 88 L. Ed. 1341 15

U. S. v. Slater, 4 Woods 356 30

Wood v. Broom, 287 U. S. 1, 53 S. Ct. 1, 77 L. Ed. 131 32

Yarbrough, Ex parte, 110 U. S. 651, 4 S. Ct. 152, 28 L. Ed. 274 24

Young, Ex parte 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714 ..... 45, 46

TABLE OF TEXTBOOKS

Cooley, Constitutional Limitations Sections 1358-1370 25

Cooley, Principles of Constitutional Law Page 263 35

29 Corpus Juris Secundem Page 28 24

CONSTITUTIONS

Federal

United States Constitution, Fourteenth Amendment, Sec. I 4

State

Georgia Constitution of 1868, Art. I, Sec. II 4

Georgia Constitution of 1945, Art. I, Sec. I, Par. II 3, 38

Georgia Constitution of 1945, Art. II, Sec. I 2, 12

Georgia Constitution of 1945, Art. III, Sec. III, Par. I. 3, 14

Georgia Constitution of 1945, Art. III, Sec. III, Par. II. 3

Georgia Constitution of 1945, Art. V, Sec. I, Par. I 34

Georgia Constitution of 1945, Art. V, Sec. I, Par. III 2, 44

Georgia Constitution of 1945, Art. V, Sec. I, Par. IV 44

STATUTES PER SE

Federal

	Page
Judicial Code, Sec. 24, as amended (28 USCA Sec. 41, (1))	38
Judicial Code, Sec. 24 (14), as amended (28 USCA Sec. 41 (14))	11, 38
Judicial Code, Sec. 238, as amended, 28 USCA Sec. 345)	1, 11
Judicial Code, Sec. 266, as amended, (228 USCA Sec. 380)	1, 10, 11
Judicial Code, Sec. 274d, as amended, (28 USCA Sec. 400)	41

Georgia

Georgia Laws, 1917, pp. 173, 183, 184; 1933 Georgia Code, Sec. 34-3212	3, 6
Georgia Laws, 1943, p. 347; Georgia Code. Ann. Pocket Part Supp. Sec. 34-3215a	3

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 532

MRS. ROBERT LEE TURMAN and CULLEN B. GOSNELL,

Appellants,

v.

J. LON DUCKWORTH, as Chairman of the Georgia State Democratic Executive Committee, et al.

Appellees.

Brief on Behalf of Appellants

The Opinion Below

The opinion of the three-judge District Court ofthe United States for the Northern District of Georgia, Atlanta Division, has not yet been officially published. However, the opinion, together with the order and judgment denying Plaintiffs-Appellants an interlocutory injunction is set forth in Appendix "E," pages 16-24, of the Statement as to Judisdiction filed by Appellants in this case.

Jurisdiction of This Court

This case is before the Court on a direct appeal from the order and judgment of a three-judge District Court invoked under sections 238 and 266 of the Judicial Code as amended by the Act of February 13, 1925, c. 299, Section I (43 Stat. 938) (U.S.C.A. Title 28, Sections 345 and 380).

Statement of the Case

The principal question presented on the record in this case is whether voters may be accorded equitable relief by declaratory judgment or injunction in protection of their right of franchise.

The Plaintiffs, duly qualified and registered voters under the laws of Georgia, in a class action in equity attacked the validity of a Georgia statute governing statewide primaries. They sought to have the statute declared unconstitutional and prayed that state and party officials be restrained and enjoined from taking certain steps in carrying into effect the results of a statewide primary held in Georgia on July 17, 1946, under the provisions of the statute which is now under attack. Plaintiffs were residents of Fulton and DeKalb Counties, the first and third most populous counties of the state. Likewise in the aforesaid primary, the largest vote was cast in Fulton County and the third largest in DeKalb County. There are one hundred fifty-nine counties in the state varying in population, according to the 1940 census, from 392,886, in Fulton, to 2,964, in Echols. In the primary mentioned the total vote cast in Fulton County was 84,550. The total vote cast in Echols County was 635. In Chattahoochee County (with a population of 15,138) the total vote cast was 265.

The Constitution of Georgia provides that "... the person having the majority of the whole number of votes shall be declared duly elected Governor of this state ..." [1] The right to vote in "elections by the people" is conferred by the Constitution of Georgia on a class of electors to which Plaintiffs belong.[2] This right is not qualified or limited and applies without regard to any political subdivision or sub-area for election purposes, where the election is one held for state officers. In 1917 the General Assembly of Georgia enacted the statute now under attack. It fully regulates the nomination of candidates for public offices by primaries and provides that candidates for nominations to state offices, including the Governor, and other Statehouse officials "who receive, respectively, the highest number of votes in any given county shall be considered to have carried such county and shall be entitled to the full vote of such county on the county unit basis, that is to say, two votes for each representative to which such county is entitled in the Lower House of the General Assembly... and the candidates for said offices respectively

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1. Article V, Section I, Paragraph III. Constitution of Georgia.
2. Article II, Section I, Constitution of Georgia.

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who shall receive a majority of all the county unit votes throughout the entire state upon the basis above set forth shall be declared . . . to be the nominees of such party . . ." [3] The further provision is made that the names of candidates so nominated shall be certified by party authorities to the Secretary of State who shall place such names on the ballot as candidates in the General Election held in November, which in 1946 falls on November 5th.[4] Nomination by the Democratic Party is, and has historically been, tantamount to election. The Constitution of Georgia designates the number of representatives from the several counties into three classes: eight counties having the largest population, three representatives each; thirty counties having the next largest population, two representatives each, and the remaining counties, one representative each.[5] Provision is made for the apportionment to be changed by the General Assembly at its first session after each United States census.[6] Thus, under the operation of the statute each of the first eight counties has six unit votes in choosing State candidates, each of the next thirty counties has four unit votes and the remaining one hundred twenty-one counties have two unit votes each, regardless of the number of votes which may have been cast in these respective counties.

The Constitution of Georgia has no "equal protection of the laws" provision which could be employed in the protection of civil rights. The present State Constitution as adopted in 1945 confines protection to person and property.[7] The language is the same as that contained in the previous State Constitution of 1877 but is different from that of the

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3. Ga. Laws 1917 pp. 173, 183, 184; 1933 Ga. Code Sec. 34-3212;

4. Ga. Laws 1943 p. 347; Ga. Code Anno. Pocket Part Supp. Sec. 34-3215a.

5. Article III, Sec. III, Par. I, Constitution of Georgia.

6. Article III, Sec. III, Par. II, Constitution of Georgia.

7. Article I, Sec. I, Par. II of Const. of Ga. of 1945 reads: "Protection to person and property is the paramount duty of government, and shall be impartial and complete."

State Constitution of 1868, (as required by Congress at that time to have included language for equal protection of the laws) where in the latter civil rights may have been protected.[8]

Plaintiffs, therefore, brought their action asserting, in effect, that although the Constitution of the State granted them the right of franchise without qualification or limitation, the General Assembly had by enactment of a county unit statute, abridged and practically destroyed that right, in that the scheme of evaluating the ballots in the more populous counties had so devalued and debased their ballots that in the recent State primary it required one hundred and six votes cast in Fulton County to equal one vote cast in Chattahoochee County and so on in varying degrees of disparity throughout the State depending on the ratio of votes cast in the smaller counties with two unit votes and the larger counties with four and six unit votes. Their complaint alleged that they cast their ballots in the Primary for a candidate for Governor who received a plurality of votes cast but not a majority of the county unit vote and that a candidate who received a majority of the county unit vote but not a plurality or majority of the popular vote would be certified by the Party authorities to the Secretary of State as the nominee of the Party unless restrained and enjoined. Plaintiffs' contention in their equitable petition was that this amounted to State action denying them the equal protection of the laws as guaranteed by Section I of the Fourteenth Amendment to the Constitution of the United States. Their suit was allowed filed by the District Judge on August 8, 1946, before the Secretary of State had placed on the ballots for the General Election and transmitted to county authorities for holding the General Election the names of the candidates chosen under this statute. The District Judge, denying a temporary restraining order, convened a three-judge court and this

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[8] Art. I, Sec. II of Const. of Ga. of 1868, in part, reads: "... and no laws shall be made or enforced which shall abridge the privileges or immunities of citizens of the United States or deny to any person within its jurisdiction the equal protection of the laws...."

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Court heard the case on August 23, 1946. Before the date of the hearing and before answer was filed the plaintiffs amended their complaint and showed that the time had then expired within which, under the provisions of other statutes not under attack, the name of any other candidate could be placed on the ballot for the holding of the General Election in November. This amendment further showed that under the Constitution of Georgia the Secretary of State was required after the holding of the General Election to hold in his possession the ballots cast and transmitted to him by the County authorities and to transmit these voting results to the next meeting of the General Assembly (which convenes in Georgia on January 13, 1947) which will declare and publish the results of the election. Plaintiffs accordingly prayed that since the only name of a candidate for Governor which could appear on the General Election ballot would be that of the candidate who in the primary received a majority of the county unit votes but did not receive a plurality or majority of the votes cast in the State and that since such nomination was illegal the balloting on same would be a mere nullity and that the Secretary of State should, therefore, be enjoined from transmitting the voting result of such election to the General Assembly. Thus two measures of relief were claimed: (1) that by declaratory judgment the act be adjudicated as invalid and unconstitutional and (2) that injunctive relief against its enforcement in the particular controversy be granted.

The defenses urged were: that the suit as related to the Secretary of State was, in effect, a suit against the State without its consent; that plaintiffs could have no remedy in a court of equity but were remitted to the legislative and political department of the State government; that plaintiffs were estopped by voting in the primary in which the county unit rule was fixed by law and the rules of the party; that the case was moot; and that the statute was not unconstitutional.

The three-judge Court entered a judgment denying an interlocutory injunction, filed an opinion therewith giving findings of fact and conclusions of law. The Court did not pass on the motions to dismiss but considered them on the general

question of the grant of interlocutory relief, holding that the Courts "shall not meddle unless the duty to do so is plain." No opinion was expressed on the defense that plaintiffs were estopped or that the case was moot or that the suit was primarily one against the State. Apparently these contentions were rejected inasmuch as the opinion of the Court went forward and ruled on the merits not only as above indicated but that the act under attack was constitutional.

Specification of the Errors

The District Court erred as follows:

1. In denying to appellants an interlocutory injunction.

2. In holding that this case is in its general aspects one of party politics.

3. In holding that the decision in *Colegrove v. Green* U. S. Sup. Ct. June 10, 1946, requires the denial of equitable relief to appellants.

4. In holding that there was no showing on the ultimate merits that the State of Georgia has deprived appellants of the equal protection of the laws; and in refusing to hold and declare that the statute under attack expressly discriminated against plaintiffs in according to them only small fractional portions of the rights granted to other citizens and electors, thus depriving them of the equal protection of the laws.

5. In refusing to declare the county unit rule of counting votes (as provided in the Act of 1917, Ga. Laws 1917, pp. 183-189) unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

6. In holding that there is nothing in the Constitution of Georgia that would prevent the Legislature "from stating the conditions on which they (primaries) may be held if the parties elect to have them."

7. In holding "our system of government, State and Federal, has never sought or demanded that each voter should have equal voting influence."

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8. In holding as follows: "But the remedy for these exceptional situations is to be sought through changes in the law, rather than by appeal to courts of equity to upset the law as unconstitutional because of a hardship that has arisen."

9. In its conclusion of law, stated in the following language:

"We conclude on all grounds that an interlocutory injunction should be denied."

The General Nature of the Appellants' Claim

In presenting this brief on behalf of appellants, it will not be contended that plaintiffs' rights initially to vote are derived from Federal source. It will not be contended that resort may be had in protecting the rights of plaintiffs either to that provision of the Constitution which guarantees to every State a Republican form of government, or to that clause of the Fourteenth Amendment to the United States Constitution which guarantees protection against state abridgment of the "privileges and immunities" of the citizens of the United States. The claim will be squarely on the contention that the abridgment of plaintiffs' right to vote is plainly violative of the equal protection clause of the Fourteenth Amendment; that while not federally derived, it is, nevertheless, federally protected; and that although the right to vote has its source in the State Constitution, the right to exemption from discrimination has its source in the Federal Constitution.

It will not here be contended that Fulton and DeKalb Counties are entitled to larger representation in the General Assembly, although it might well be so contended in a proper forum. This is not a suit by or in behalf of counties but is one by individual voters. Instead it will be contended that plaintiffs and the class of voters represented by them in Fulton and DeKalb Counties and other counties are entitled to protection against gross discrimination by State statute. It will not be contended that relief should be granted merely because the state itself suffers great evils from the cunning scheme and device of diluting the effect of large voting

groups. Instead it will be urged that appellants, as plaintiffs in the action brought in the District Court, sought protection against private wrongs; that they sought equitable protection because no relief could be had at law; that this protection was sought under the Federal Constitution and the Civil Rights statute because no such remedies were provided under their own Constitution.

Thus, we seek to eliminate, as belonging more properly to the political field, the more general questions of freedom and equality and the other traditional principles concerned in the founding and history of our representative government. We go so far as to recognize that this Court has spoken of its own inhospitality to cases which belong purely to the political department of government. *Snowden v. Hughes*, 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497. We come with full confidence and without fear that the plain and simple question of the abridgment of private rights in such a case as this will be so considered.

The issue in the pending case is more concise, more clearly outlined, more specifically defined than that in any reported case we have found. It provides no questions relating to the construction or application of the law either creating the right or directing the discrimination. The question is clear cut and boils down to this, somewhat as stated above in our first paragraph: Does our system of jurisprudence comprehend respecting suffrage that a court of equity will afford relief in no event and under no circumstances whatever, no matter how plain the right or how conspicuous its invasion? We insist that the present case warrants relief under the severest standards that have yet been set on this subject.

SUMMARY OF ARGUMENT

I.

The District Court had jurisdiction of the parties and the subject matter in this cause.

II.

This Court has jurisdiction in this case on this appeal.

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III.

Under the provisions of the Constitution of the State of Georgia the Plaintiffs-Appellants have the right to vote for Governor and other State House officers in General Elections.

(a) In the grant of this right there is no qualification or limitation except as "electors" are defined.
(b) The right to vote for state officers relates to the whole area of the state and is in no respect qualified or limited by classification to counties or other sub-areas of the state.

(c) The right to vote (by casting ballots) includes the right to have the vote counted on the basis substantially equal in value to the votes of all others enjoying the right.

IV.

Any classification by statute even if allowed by the State Constitution must be upon a reasonable and rational basis and must not set up gross discrimination between groups or classes by counties or other geographical areas.

V.

The Primary Election governed by the statute under attack has been made a part of the public election process and machinery of the state; action under it is state action; nomination in such a Primary is tantamount to election and for the purpose of testing rights of Plaintiffs-Appellants in this case such a Primary must be treated as "an election by the people."

VI.

The statute under attack with its county unit plan was expressly designed to restrict the suffrage of voters in the more populous counties. It grossly discriminates and operates against them and deprives them and those in their class of the equal protection of the laws as guaranteed by Section I of the Four-

teenth Amendment to the Constitution of the United States.

VII.

While this case may concern political action it nevertheless seeks protection of civil rights. It involves private wrongs and not merely a public system. Equity has jurisdiction and the District Court had the power and duty to grant a temporary and interlocutory injunction.

VIII.

The District Court as constituted had the power and duty to declare the Act complained of unconstitutional whether or not Plaintiffs-Appellants were entitled to injunctive relief.

IX.

Plaintiffs-Appellants have no adequate remedy at law by an action for damages or otherwise.

X.

Plaintiffs-Appellants are not estopped by their participation in the primary election.

XI.

The present action insofar as it relates to the Secretary of State is not a "suit against the State".

XII.

It is not too late to grant effective relief nor would it be an improper exercise of this Court's power to do so.

ARGUMENT

I.

The District Court had jurisdiction of the Parties and the subject matter in this cause.

Section 266, Judicial Code, as amended, 28 U.S.C.A. 380;

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Section 24 (14) Judicial Code, as amended, 28 U.S.C.A. 41 (14);

Nixon v. Herndon, 273 U. S. 536, 47 S. Ct. 446, 71 L. Ed. 759;

Smiley v. Holm, 285 U. S. 355, 52 S. Ct. 397, 76 L. Ed. 795;

Richardson v. McChesney, 218 U. S. 487, 31 S. Ct. 43, 54 L. Ed. 1121.

The foregoing cases are cited as only formal authority for jurisdiction generally of this type of case. There seems to be no challenge of the jurisdiction over the parties. The general challenge that equity has no jurisdiction to grant the relief prayed will be treated more fully in other parts of the brief, particularly under divisions VII and VIII.

II.

This Court has jurisdiction in this cause on this appeal.

Section 266 Judicial Code, as amended, 28 U.S.C.A. 380;

Section 238 Judicial Code, as amended, 28 U.S.C.A. 345.

III.

Under the provisions of the Constitution of the State of Georgia the Plaintiffs-Appellants have the right to vote for Governor and other State House Officers in General Elections.

(a) IN THE GRANT OF THIS RIGHT THERE IS NO QUALIFICATION OR LIMITATION EXCEPT AS "ELECTORS" ARE DEFINED.

(b) THE RIGHT TO VOTE FOR STATE OFFICERS RELATES TO THE WHOLE AREA OF THE STATE AND IS IN NO RESPECT QUALIFIED OR LIMITED

BY CLASSIFICATION TO COUNTIES OR OTHER SUB-AREAS OF THE STATE.

(c) THE RIGHT TO VOTE (BY CASTING BALLOT) INCLUDES THE RIGHT TO HAVE THE VOTE COUNTED ON THE BASIS SUBSTANTIALLY EQUAL IN VALUE TO THE VOTES OF ALL OTHERS ENJOYING THE RIGHT.

Article II of the Constitution of Georgia deals with elective franchise and provides that elections by the people shall be by ballot of those persons qualified and registered and that every citizen of the State who is a citizen of the United States, eighteen years of age or above and not laboring under enumerated disabilities "shall be an elector and entitled to register and vote in any election by the people." [9]

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[9] Const. of Ga. Art. II; Sec. I:

Par. I. Elections by ballot; registration of voters. Elections by the people shall be by ballot, and only those persons shall be allowed to vote who have been first registered in accordance with the requirements of law.

Par. II. Who shall be an elector entitled to register and vote. Every citizen of this State who is a citizen of the United States, eighteen years old or upwards, not laboring under any of the disabilities named in this Article, and possessing the qualifications provided by it, shall be an elector and entitled to register and vote at any election by the people: Provided, that no soldier, sailor or marine in the military or naval services of the United States shall acquire the rights of an elector by reason of being stationed on duty in this State.

Par. IV. Qualifications of electors. Every citizen of this State shall be entitled to register as an elector, and to vote in all elections in said State, who is not disqualified under the provisions of Section II of Article II of this Constitution, and who possesses the qualifications prescribed in Paragraph II and III of this Section or who will possess them at the date of the election occurring next after his registration, and who in addition thereto comes within

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There is no challenge of plaintiffs' right under these constitutional provisions and they are therefore entitled to become plaintiffs in such an action and to represent members of their class.

It will be noted that the grant of this right of suffrage is in its nature unlimited and unqualified. It is as fully granted to a person in Fulton or DeKalb County as it is to a person in Echols or Chattahoochee County. In its grant it is not limited either to groups or by geographical boundaries, by election areas or by political sub-divisions. Insofar as State Officers elected by the people are concerned, they are named under the language of the Constitution in "elections by the people," i.e., by the people of the whole state. Let it be noted in reference to arguments later to be made that the Governor chosen in "elections by the people" is elected for the whole state of Georgia. He governs the whole state of Georgia as one area, not by counties. His election is statewide as in one election area, not by counties.

Under the Constitution of Georgia it is provided that the House of Representatives "apportion among the counties" as follows: Three members to each of the eight largest

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either of the classes provided for in the two following subdivisions of this paragraph.

1. All persons who are of good character and understand the duties and obligations of citizenship under a republican form of government; or,

2. All persons who can correctly read in the English language any paragraph of the Constitution of the United States or of this State and correctly write the same in the English language when read to them by any one of the registrars, and all persons who solely because of physical disability are unable to comply with the above requirements but who can understand and give a reasonable interpretation of any paragraph of the Constitution of the United States or of this state that may be read to them by any one of the registrars.

counties; two members to the next thirty largest counties; one member to each of the other counties.[10] The residents of a county are the constituents of the representatives of that county. The residents of other counties are not. The Executive Department consists of only one Governor, elected by a majority of the votes in a statewide election. Being an individual, the Governor, of course, cannot be "apportioned among the counties" in fractional parts. His constituents are the entire statewide population. His responsibility runs to each person in the state in the same proportion. This is recognized by the Constitution in requiring his election by a majority of his constituents. When the Legislature undertook by statute to divide the process of electing a Governor into two elections rather than one, the principles above stated apply in the same way to both elections.

The State of Georgia undertook in its Constitution to make classification in at least two important governmental matters. It did not give to its legislature any express authority to make any further classifications in those realms. (1) It classified its residents as to right to vote into registered electors and non-electors. (2) It classified its registered electors into classes territorially, to wit: those residing withing the limits of a prescribed election area, or using language applicable to courts, to those residing within an election "jurisdiction" and those residing outside of that "area" or "jurisdiction." The State, by its Constitution, also classified its officials and created various election areas or jurisdictions for different officials. Some officials it designated as County Officers, some District Officers, some State Officers, whose election or jurisdictional area in each case coincided with the area he has to

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[10] Const. of Ga. Art. III, Sec. III:

Par. I. Number of representatives. The House of Representatives shall consist of representatives apportioned among the several counties of the State as follows: To the eight counties having the largest population, three representatives each; to the thirty counties having the next largest population, two representatives each; and to the remaining counties, one representative each.

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represent or in which he could exercise jurisdiction if elected. It is our contention that those constitutional provisions were (here in the language of the Fourteenth Amendment to the United States Constitution) "laws" to which the equal protection clause applies; thereby preventing the Legislature from interference or further classification involving discrimination between voters in the same election arear.

It seems argument would hardly be required to establish that a person who is granted the right to vote has also by the same grant the right to have the vote or ballot counted. The Constitution did not grant to the citizen in Chattahoochee County the right to vote one hundred six times in the same election and the citizen in Fulton to vote only one time. The General Assembly, however, by enactment of the statute complained of did exactly that by its provision that the whole vote of Chattahoochee County should in the nomination (equivalent to election) count for two votes and the total vote in Fulton County should count for six unit votes in the same nomination. The right to vote as conferred by the Constitution is a fruitless bestowal if the Legislature by statute can render it virtually ineffectual in a particular area. It is only a slight difference of degree if the Legislature, while permitting the vote to be counted, at the same time provides as to a certain class of voters in an unfavored area a vote shall only be counted for .005% of the vote of another in a favored area in the state. The courts have long ago been realistic enough to recognize that this is so. Mr. Justice Holmes in *U.S. v. Mosely*, 238 U.S. 383, 35 S. Ct. 904, 59 Law Ed. 1355, stated: "We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in the box." Mr. Justice Black recently stated in the dissenting opinion in *Colegrove, et al. v. Green*, 66 S. Ct., advance sheet July 1, 1946, page 1198, at 1211: "... the constitutionally guaranteed right to vote *and the right to have one's vote counted* clearly imply the policy that state election systems, no matter what their form, should be designed *to give approximately equal weight to each vote cast* ..." (Underscoring or emphasis ours). In another recent case, *U.S. v. Saylor*, 322 U. S. 385, 64 S. Ct.

1101, 88 L. Ed. 1341, this Court as a predicate to upholding the right to Federal prosecution for fraud in state elections, gave its sanction to the doctrine quoted above from Mr. Justice Holmes in the Mosely case (and this doctrine we do not understand the dissent in the Saylor case to have challenged). Mr. Justice Roberts in commenting on the Mosely case pointed out that "The case affirms that the elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted." And further in *Colegrove v. Green*, supra, Justice Black in the dissenting opinion stated: "It (the legislature) can no more destroy the effectiveness of their vote in part and no more accomplish this in the name of 'apportionment' than under any other name. . . . No one would deny that the equal protection clause would also prohibit a law which would expressly give certain citizens a half vote and others a full vote." See also *U. S. v. Classic*, supra, 313 U. S. 290, 61 S. Ct. 1031, 85 L. Ed. 1368.

A significant statement on the same principle is found in the case of *Attorney-General v. Suffolk County Commissioners*, 224 Mass. 598, 113 N. E., 581, where it said: "There can be no equality among citizens if the vote of one county have considerably more weight than that of another in electing public officers."

IV.

Any classification by statute even if allowed by the State Constitution must be upon a reasonable and rational basis and must not set up gross discrimination between groups or classes by counties or other geographical areas.

It is questionable whether since the Constitution of the State fixed the class of voters who could exercise the right of franchise any further classification whatever may be made by the General Assembly. It has been held that constitutional classification is exhaustive and that legislative action in derogation is invalid. *Morris v. Parnell*, 125 Ind. 281, N. E. 221.

In the foregoing case, Elliot, J., in a concurring opinion, wrote: "The general assembly has no power to classify voters

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except as the constitution expressly provides, no matter what system it may adopt. That is so for the invincible reason that the prerogative of conferring and defining the right of suffrage is that of constitution makers and not that of the creatures of constitutions. The electors who frame constitutions, and give being and power to legislatures, are above the created things, and legislators cannot reach above themselves to the source of their power, and the authors of their existence, for the purpose of enlarging or restricting the sovereign right of suffrage. If it were otherwise, legislators would be the masters, and masters they are not. If the legislature can limit or even define the right of suffrage then it is greater than its constituency, but it can do nothing of the kind for the right of suffrage is not subject to legislative power. The right of suffrage is a political right of the highest dignity. It is a right of which, as the courts have declared, no department of government; nor all of them combined, can divest the citizen otherwise than in the mode, and to the extent, expressly authorized by the constitution. *State v. Adams*, 2 Stew. (Ala.) 239."

See also *Brewer v. McClelland*, 144 Ind. 423, 32 N. E. 299.

However, we are not required to assert or maintain that doctrine for a certainty, because unquestionably the General Assembly has no right to wholly exclude one class and admit another in the enjoyment of such a right granted by the Constitution and any sort of classification if permitted must rest upon some reasonable or rational basis. The lower Court in its opinion in this case admitted that under the operation of this statute there was in instances "a glaring inequality" but it would hardly require an adjudication to establish that one voter having his vote counted for one hundred six times more in value than another voter would present the grossest discrimination well to be imagined. The power of the State to classify if it exists under constitutional provision such as we here have under review could not be held to be an unlimited one. To do so would be to hold that the same power could completely destroy. Georgia is the only state in the union which employs such a device as the county unit system.

The lower Court sustained it under the guise that it was "not irrational." A few years ago Tennessee enacted a similar statute which will later be discussed. The Supreme Court of Tennessee readily held it invalid as an irrational classification which denied the equal protection of the laws both under its own Constitution and under the Fourteenth Amendment to the Constitution of the United States. This adjudication was made in the reported case of *Gates v. Long*, 172 Tenn. 471, 113 S.W. (2nd) 388.

It was stated in *Nixon v. Herndon*, supra: "States may do a good deal of classifying that is difficult to believe rational but there are limits . . ." By specific provisions of the Federal Constitution classification which would exclude voters on account of color, race or sex of course have long ago been made and enforced by the Courts in cases which appear cited throughout this brief but forbidden classification is by no means limited to those cases expressly provided for in the constitution. We take it further to be without question that if the legislative enactment instead of debasing the total vote of Fulton county as is now done should provide that all voters living in Fulton and DeKalb Counties should be excluded from participation in primary election for state offices, that these voters could successfully complain and secure relief. The case, of course, cannot be considered as one where there might be merely slight or insubstantial variations in the effect of a vote. The effort at classification under this statute is not to give approximately equal value to votes cast, it is one to see to it that approximately equal value shall be denied.

We have already said in effect that this proceeding was not initiated and is not being maintained in behalf of Fulton and DeKalb Counties as such. It is in behalf of the individuals who have been discriminated against. The lower Court seemed to give some weight to the general power of government to classify its electors for voting purposes, calling attention to the continuous classification in Georgia by which members in the General Assembly were allocated into the three classes already pointed out, page 3 of this brief. The Court further referred to the county unit system as if there were to be found for it a historic pattern in the scheme of representation

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in the National Congress whereby each state, regardless of population, has two representatives in the United States Senate, drawing the further comparison to the system of selecting or allocating the number of presidential electors as among the several states. There are at least two ready answers to this comparison which at once show that it in no way bears upon the question now before the Court. What may be written, as was done by the great compromise in founding this republic, into the pact between the states, represented by the Constitution of the United States and what has been written in the Constitution of Georgia on the subject of classification is upon a wholly different basis from what a legislative body with limited power may do in derogation of the very provisions of the Constitution. It is again to be borne in mind that the Constitution of Georgia classified its voters and electors. That classification for voting for State offices was not by sub-areas but for the whole State of Georgia. It granted no powers to the General Assembly of Georgia to make any further classification. Even the Electoral College by providing that the largest percentage of its membership shall be distributed in accordance with the population was aimed at the general purpose of equality between the citizens. The adding of two members from each state, symbolizing the two Senators, has only slight effect in the ultimate result.

The action in this case is not merely to rid the State of an evil and invalid electoral system but is one that seeks to strike down a statute plainly and deliberately discriminating against appellants as a class. Appellants are not complaining that Fulton or DeKalb County has only six unit votes but rather that appellants as individual voters and those in the class represented by them may exercise only a fractional part of their right. They complain that they are allowed only a fractional part of the voting effectiveness accorded by the statute to other voters in the statewide voting area. The system of giving effect to county lines in evaluating votes is highly discriminatory in that the Constitution of Georgia gave to each voter the same right. The particular number of votes any county has is merely illustrative of the extent of the discrimination caused by the county unit system.

The fact that this scheme affords a means of virtual disfranchisement to racial and religious minorities, obviously located in the more populous centers and industrial areas, is not the basis of plaintiffs' claim but affords abundant illustration of the extent to which plaintiffs are deprived of their right and is arresting evidence of the necessity to find refuge in the fundamental guarantees of the Federal Constitution.

V.

The Primary Election governed by the statute under attack has been made a part of the public election process and machinery of the state; action under it is State action; nomination in such a Primary is tantamount to election and for the purpose of testing rights of Plaintiffs-Appellants in this case such a Primary must be treated as "an election by the people."

Perhaps it may be properly said that no action similar to this has been previously brought in Georgia for the reason that prior to the decisions of the Court in *U. S. v. Classic* and similar cases it had been the popular belief, as had been held in *Grovey v. Townsend*, 295 U. S. 45, 55 S. Ct. 622, 79 L. Ed. 1292, that this nominating device enjoyed a special immunity from legal attack under the claim that party primaries were purely voluntary and autonomous and while many courageous leaders of political thought had worked at the problem and occasionally had made sallies in the direction of breaking down this immunity, the beachhead was never really established until the line of cases referred to, *U. S. v. Classic*, and similar ones, had been decided. Finally and specifically with reference to the primary statutes of Georgia, that is, the whole comprehensive scheme under which primaries are held, including as its principal hallmark the county unit system here under attack, it was held in *King v. Chapman*, 154 Fed. 2nd, 460, 464,.....U.S....., 66 S. Ct. 905,.....L. Ed.....(certiorari denied): "This act appears in large measure to take such primaries out of the control of the parties initiating them, and to substitute the state's

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will in determining the mode of choice of the party nominee . . . "

". . . We think that the provisions show that the State, through the managers it requires, collaborates in the conduct of the primary, and puts its power behind the rules of the party. It adopts the primary as a part of the public election machinery. The exclusions of voters made by the party by the primary rules become exclusions enforced by the State and when these exclusions are prohibited by the Fifteenth Amendment because based on race or color, the persons making them effective violate under color of state law a right secured by the Constitution and laws of the United States within the meaning of the statute which is here sued on."

Thus, although there is abundant authority in State and Federal jurisdiction back of this principle, it would seem that the case is no longer open to contention that the state may through the device of legislation controlling the primaries abridge or deprive plaintiffs of their voting rights. This is manfestly true in a state where as in Georgia the nomination is controlling and tantamount to election. As stated in *People v. Fox* (Supreme Court of Illinois) 294 Ill. 263, 128 N.E., 505: ". . . the right to choose candidates for public office whose names are to be placed on the official ballot has been held as valuable as the right to vote for them after they are chosen and is of precisely the same nature." That case which cited as authority *Sherman v. People*, 210 Ill. 552, 71 N. E. 618, dealt with an act of the state legislature regulating primaries on a scheme of counting by districts similar in principle to the county unit plan. It held that for small areas to be thus given "an equal, unbalanced and controlling power" destroyed the equality and freedom of elections and discriminated against electors similarly situated and in applying a constitutional provision "that all elections shall be free and equal" made use of the judicial power to reach the nominating process in primaries as readily as would be in the case of General Elections.

In reviewing cases of discrimination through limiting devices incorporated in primary laws, this Court in *Smith v. Allwright*, 321 U. S. 649, 661, 64 S. Ct. 757, 88 L. Ed. 819,

said: "It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State like the right to vote in a General Election is a right secured by the Constitution.

> *United States v. Classic*, 313 U. S. 299, at 314, 61 S. Ct. 1037, 85 L. Ed. 1368; *Meyers v. Anderson*, 238 U. S. 368, 35 S. Ct. 932, 59 L. Ed. 1349; *Ex parte Yarbrough*, 110 U. S. 651, 663 et seq., 4 S. Ct. 152, 158, 28 L. Ed. 274."

In *Nixon v. Herndon*, supra, Mr. Justice Holmes states:

> "If the defendant's conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result."

It is also to be remembered that in *Nixon v. Herndon*, supra, relief was granted against discrimination in a primary where a unanimous opinion by this Court was rendered finding it unnecessary to apply the Fifteenth Amendment although the discrimination was by reason of race. It was there stated that no more obvious violation of the equal protection clause of the Fourteenth Amendment could well be imagined.

Applying the foregoing principle to the case now at hand it is seen that appellants were granted under the State Constitution the right to vote "in elections by the people" for State officers without qualification or limitation either as to race, color, sex or geography. The General Assembly in derogation of that right sought to prescribe by indirect means by a provision that would give a certain class of voters only a slight percentage of the vote, which obviously they could not have directly accomplished.

VI.

The Statute under attack with its county unit plan was expressly designed to restrict the voters in the more populous counties. It grossly discriminates and operates against them and deprives them and those in their class of the equal protection of the

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laws as guaranteed by Section I of the Fourteenth Amendment to the Constitution of the United States.

We are attaching as an Appendix (Exhibits 1-7) a compilation of the voting results in the primary election of August 17, 1946, and illustrations by graphs and symbols showing the extent of discrimination among voters provided by the statute under attack. These exhibits show the extent of the discrimination with reference to each of the one hundred and fifty-nine counties. Exhibit 3 shows that under operation of the system in the most recent primary it required 14,092 votes in Fulton County to equal one unit vote out of a total of four hundred ten in the choice for Governor; that in Chattahoochee 132 votes equalled one unit vote. In Brantley County 750 votes offset Fulton's 14,092; in Burke County 686 votes equalled Fulton's 14,092, DeKalb's 4,462 and Chatham's 6,751. It shows also that this sort of discrimination does not occur merely in isolated cases but that it is the rule rather than the exception. Exhibit 5 shows that in the recent primary the candidate supposed to have been nominated received 42.96% of popular votes cast in the "election by the people" with 59.02% of the unit votes cast. Another candidate received 45.30% of the popular vote cast and only 35.61% of the unit vote provided under the statute. Exhibit 6 also discloses that under the operation of this system at least in one instance within the past fifteen years a candidate for Governor could have gone into office with only 4.34% of the popular votes cast and in 1942 a candidate for Governor under the compulsion of this system could have gone into office with only 14.87% of the popular votes. In order to fully appreciate the sweeping and shocking extent of discrimination complained of, we invite and urge the Court to examine the graphic illustrations attached in this appendix.

Does a state statute providing this kind of scheme of debasing and diluting the votes of one class and giving undue, unbalanced and inflated value to the votes of those in another class violate that clause of the United States Constitution as amended which provides that "No State shall make or en-

force any law which shall abridge the privileges or immunities of citizens of the United States; . . . ; nor deny to any person within its jurisdiction the equal protection of the laws."?

In support of their contentions that no substantial Federal question is involved in this case, appellees have cited and apparently relied upon cases such as *Minor v. Happersett*, 88 U. S. 162, 21 Wall. 162, 22 L. Ed. 627, *Ex parte Yarbrough*, 110 U. S. 651, 4 S. Ct. 152, 28 L. Ed. 274, and have taken the position in this case that since the right of suffrage which plaintiffs seek to protect does not stem from a Federal source it is not entitled to Federal protection. But the doctrine with reference to protection and enforcement of rights arising under the Constitution and laws of the United States in which appellees have taken doubtful comfort applies only to the privileges and immunities clause of the Fourteenth Amendment quoted above, not to the equal protection clause. Otherwise the discrimination practiced against Nixon by State action would not have been condemned by unanimous decision of this Court in *Nixon v. Herndon*, supra. The adjudication there rested not on the Fifteenth Amendment nor upon the privileges and immunities clause of the Fourteenth Amendment but upon the equal protection of the laws clause, it being stated that it was unnecessary to consider the Fifteenth Amendment "because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth." It is to be remembered that no new rights were conferred on citizens by these two land-marking amendments, they merely expressly and specifically prohibited abridgment and discriminations by the States. A federally derived right is different from a federally protected right. The equal protection clause of the Fourteenth Amendment is not dependent upon the right (protection of which is denied by State action) being a right granted by the Constitution or laws of the United States. "The laws" which must be administered equally are state laws — with Federal protection against discrimination. "While the right to vote comes from the State . . . the right of exemption from the prohibited discrimination comes from the United States," 29 C.J.S. page 28; *Judice v. Village of Scott*, 168 La., 111, 121 So. 592;

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certiorari denied 280 U. S. 566, 50 S. Ct. 26, 74 L. Ed. 620. In *State v. Edwards*, 95 W. Va. 599, 122 S.E. 272, is was held that while the right of suffrage is not an inherent right of citizenship, yet when it is granted to a class of electors it may not be abridged or denied to members of that class by legislative enactment; that once conferred it may be protected as having the same dignity as the more fundamental rights which are inherent.[11]

So Mr. Cooley in his work on Constitutional Limitations, Section 1358-1370, after stating "Wherever the constitution has prescribed the qualifications of electors they cannot be changed or added to by the legislature or otherwise than by amendment of the Constitution," and recognizing the right of the legislative body to make reasonable regulations for the exercise of the right of franchise, says: "All regulations of the elective franchise however must be reasonable, uniform and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote or unnecessarily to impede its exercise; if they do they must be declared void." In *McPherson v. Blacker*, 146 U. S. 1, 13 S. Ct. 3, 36 L. Ed. 869, wnere

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11. "It is true, as argued by counsel for the State, that the privilege of voting is not inherent or a natural right which exists in the absence of constitutional or legislative grant; but it is equally true, that when such right has been granted by the constitution of the State, it cannot be denied or abridged by legislative enactment. 20 C.J. 62; 9 R. C. L. 980; 7 Ann. Cas. 665; 10 Am. & Eng. Enc. Law, 569; Cooley's Const. Lim. (7th Ed.) 99,902. And it has been said that the right to vote is one reserved by the people of the state to members of a class, and when so reserved by constitutional enactment the right is guaranteed to the class of persons named, and is thus given a dignity not less than any other of many fundamental rights. State ex rel. McGrael v. Phelps, 144 Wis. 1, 128 N. W. 1041, 35 L. R. A. (N. S.) 353; 9 R. C. L. 980." State v. Edwards, supra.

legislation affecting the right of voters was under consideration, this Court through Mr. Chief Justice Fuller stated: "The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States but the last has been. *United States v. Cruikshank,* 92 U. S. 542; *United States v. Reese,* Id. 214. . . . The right to vote intended to be protected refers to the right to vote as established by the laws and Constitution of the state . . . The object of the Fourteenth Amendment in respect of citizenship was to preserve equality of rights and to prevent discrimination as between citizens but not to radically change the whole theory of the relations of the state and federal governments to each other and of both governments to the people. *In re Kemmler,* 136 U. S. 436, 10 S. Ct. Report 930.

"The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. *Milling Company v. Pennsylvania,* 125 U. S. 181, 188, 8 S. Ct. Report 737."

In *Gulf C. & S. F. Railway Co. v. Ellis,* 165 U. S. 150, 17 S. Ct. 255, it was stated at page 258:

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in Yick Wo v. Hopkins, 118 U. S. 356, 369, 6 Sup. Ct. 1064, 1071: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official

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action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.' "

Reference has already been made to an effort to establish a similar county unit system in the State of Tennessee. The consequences of legislative action under which voters in the large counties of Tennessee would be penalized by having their votes in state elections count for only a fractional part of votes in smaller counties reached the Supreme Court of Tennessee in the case of *Gates v. Long*, 172 Tenn. 471, 113 S. W. 2nd, 388. Plaintiff voters in an equity case there sought, among other things, a decree holding that county unit scheme unconstitutional as violative of the equal protection clause of the State Constitution of Tennessee and the Fourteenth Amendment to the United States Constitution. There, almost in the same language as in the statute now under discussion in this case, it was provided "for the purposes of this action the county unit basis shall mean that the candidate who receives the highest number of popular votes in any given county shall be considered to have carried such county and shall be entitled to the full county unit vote of such county." Then after providing that "each county shall have as its county unit vote that number of votes divided by one hundred which such county in the last General Election cast for the party nominee for Governor" added the further provision that "the maximum county unit vote any county irrespective of total vote cast shall be 1/8 of 1% of the population of such county . . .", thus establishing a high degree of preference for the benefit of voters in small counties as compared to those in the more populous ones. The Tennessee Supreme Court found no difficulty in holding that such an action by debasing the value of a class of individual votes (in the more populous counties whose combined vote was given an arbitrary limit in weight or value) was an arbitrary abridgment of their rights. The attack on the statute was fully

sustained.[12] Another case mentioned above in connection with the subject of classification is that from the Supreme Judicial Court of Massachusetts, *Attorney General v. Suffolk County Commissioners*, 224 Mass. 598, 113 N.E. 581. There the Court had before it actions for mandamus and bill in equity to determine the validity of action taken by Commissioners in setting up election districts and apportioning the number of representatives in the state law making body under provisions of the State Constitution securing equal rights of all qualified voters to elect public officials. On the merits of the controversy it was held that the discrimination was clear — "the inequality is gross and palpable and extends to a considerable number of districts." Here the records showed only slight discrimination as compared to that in case under consideration. The Constitution of Massachusetts had not provided for representation in their General law making body but had prescribed that in doing so the legislature should observe set standards of equality based upon the

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[12] 113 S.W. (2) 391, (2) "With respect to their right to vote in the primary elections of their party, the Supreme Court in the Texas cases has three times said that citizens were entitled to the protection of the 14th Amendment to the Federal Constitution. Nixon v. Herndon, 273 U. S. 536, 47 S. Ct. 446, 71 L. Ed. 759; Nixon vs. Condon, 286 U. S. 73, 52 S. Ct. 484, 76 L. Ed. 984, 88 A.L.R. 458; Grovey v. Townsend, 295 U. S. 45, 55 S. Ct. 622, 79 L. Ed. 1292, 97 A.L.R. 680. For the same reason they would be entitled to the protection of Section 8 of Article I and Section 8 of Article II of the Constitution of Tennessee, the equal protection of the Law. That is to say, the state can not confer this right upon one class of voters and deprive another class of voters of such right unless the discrimination can be justified on some rational basis." "Neither, we take it, can the state without reason abridge this right in one class of voters and leave the right whole in another class of voters. The one-eighth of one per cent limitation in those counties which it reaches amounts to excluding some of the voters from their party's primary or of debasing the ballots of all the voters."

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number of voters in the respective districts. The test there to be applied was the same as the one required by the present case. The ratio of discrimination was no more than instances of two or three to one—nothing approaching one hundred and six to one or forty or more to one, etc., as in the present case. After rejecting the claim that the Court should not lend its aid because political questions were involved it was stated:

> "It has been argued ably in behalf of the Commissioners that the grave results which will follow from declaring the report null and void should cause hesitation in sustaining the petitioner's contentions. These considerations may be entitled to weight in determining whether a constitutional mandate has been violated. But, when once it has become evident beyond a doubt that the constitution has been infringed and that rights indisputably secured by it have been trampled, then there is no other way but to maintain the constitution when relief is promptly sought. No consequence of adherence to the constitution can be so evil as a failure to abide by its terms under the circumstances here disclosed. 113 N. E. 587 (6)."

In the Commonwealth of Kentucky where the Constitution required representative districts to be approximately equal in proportion, certain citizens and taxpayers brough an equitable proceeding attacking an act of the General Assembly as providing districts grossly unequal. *Ragland v. Anderson*, 125 Ky. 141, 100 S. W. 865. The Court there said: "Equality of representation is a vital principle of democracy. In proportion as this is denied or withheld, the government becomes oligarchal or monarchial. Without equality Republican institutions are impossible. Inequality of representation is a tyranny to which no people worthy of freedom will tamely submit. To say that a man in Spencer County shall have seven times as much influence in the government of the State as a man in Ohio, Butler or Edmondson is to say that six men out of every seven in those counties are not represented in the government at all. They are required to submit to taxation without representation." While the last mentioned case related to apportionment of representation in the legislative

body of the government, the statute involved was being measured under a constitutional requirement that the districts be established to attain equality among the voters.

On the general subject of elective franchise attention is called to an opinion written by a District Judge (Northern District of Texas, 1881) in the case of *United States v. Slater*, 4 Woods 356, which has been often cited in various courts of the country, it was there said:

> "Our government is founded on the elective franchise. The right to exercise this franchise is declared, defined and guaranteed by organic provisions superior to any of the departments of the government. The legislature cannot enlarge it or restrict it, and can only regulate it so far as their authority to do so is expressly, or by necessary implication, given in the constitution. Much less may the courts presume to restrict it by construction. On the contrary, the whole spirit of our institutions constrains the courts to give our organic provisions, on the subject of the enjoyment of the right of suffrage, such a construction as will permit the most liberal exercise of this supreme right which is at all reasonably consistent with the terms of those provisions. . . ."

If Plaintiffs in this case, as electors under the State Constitution, had been wholly denied the right to cast their ballot, they would clearly have been entitled to maintain an action for damages.

Nixon v. Condon, 286 U. S. 73, 52 S. Ct. 484, 76 L. Ed. 984;

Lane v. Wilson, 307 U. S. P. 268, 59 S. Ct. 872, 83 L. Ed. 1281;

King v. Chapman, 62 Fed. Sup. 639, 154 Fed. 2d 469, certiorari denied.....U. S.....; 66 S. Ct. 905, ...L. Ed.....;

Smith v. Allwright, 321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 819;

Swafford v. Templeton, 185 U. S. 487, 22 S. Ct. 783, 46 L. Ed. 1005.

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This sort of recovery would have been allowed because the action of State or party officials by reason of the state statute under which such action was taken, would have been to deprive them of equal protection under the laws. We say again that if the statute, instead of taking from the sum total of the votes cast in Fulton and DeKalb Counties and therefore from each of the votes making up this total, had provided that all qualified voters North of Macon or North of Atlanta should be excluded from participation in the choice of a candidate for Governor it would hardly be contended that this did not violate their constitutional guarantees by denying them equal protection of the laws. Legislation by the State on the subject of franchise is no more exempt from the test under equal protection of the laws than legislation on any other subject and that subject need not be Federal in character. Laws making certain acts crimes must be uniform and applicable to all the people of the State. This would be true as to legislative representation, rights of free education and so on in the whole field of the law.

VII.

While this case may concern political action it nevertheless seeks protection of civil rights. It involves private wrongs and not merely a public system. Equity has jurisdiction and the District Court had the power and duty to grant a temporary and interlocutory injunction.

The District Court held this case to be one of "party politics" and one in which courts either could not or should not "meddle" by granting relief. Here lies the main attack made on the case. At the outset we give full recognition to the so called traditional doctrine that equity is loathe and hesitant to lay its heavy hand on processes normally at work in the political department of government. In *Colegrove v. Green*, ... U. S. ....., 66 S. Ct. 1198, Advance Sheet, July 1, 1946, 90 L. Ed. 1242, in speaking of the reluctance and frequent refusal of the Court to interfere in purely political controversy, Mr. Justice Frankfurter very recently stated: "It has refused to do so because due regard for the effective working of our government revealed this issue to

be of a peculiarly political nature and therefore not meet for judicial determination," saying at another point, page 1201, that "the Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and ultimately on the vigilance of the people in exercising their political rights." We are not asking that these principles be revised or modified. Full relief may be had by appellants without doing violence to these principles. What we do ask is that the Lower Court's ruling that the present case is one of party politics and therefore subject to the application of that rule be reversed. We have abundant grounds for so asking quite within the bounds of precedent. Perhaps it may be as well to consider at once the recent case of *Colegrove v. Green*, supra, for it deals in a large measure with that question and at the time this is being written the case is still pending in this Court on motion for rehearing. Whatever may be said about the final judgment in that case it does not control this case, although the distinguished Judges who delivered the opinion in the District Court were of the opinion that it did. The District Court in the Colegrove case ruled against petitioner because it felt bound by this Court's opinion in *Wood v. Broom*, 287, U.S. 1, 53 S. Ct. 1, 77 L. Ed. 131. Three of the Justices of this Court felt that view was correct, stating that "we could also dispose of this case on the authority of *Wood v. Broom*. The legal merits of this controversy were settled in that case . . ." Now *Wood v. Broom* has no real bearing on the case here under consideration. It involved a congressional reapportionment act and brought into question whether or not certain Federal legislation was still of force. Four of the Justices of this Court had in *Wood v. Broom* been of the opinion that it should have been disposed of "for want of equity." Three of the Justices participating in *Colegrove v. Green* were of the same opinion, pointing out that the basis of the Colegrove suit was not a private wrong "but a wrong suffered by Illinois as a polity" and also gave heavy emphasis to the fact that the Federal Constitution had lodged in the Congress final power over the subject of congressional representation. So there is nothing in that portion of the opinion which in the least precludes

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judgment favorable to appellants in this case. Three of the Justices, speaking in the opinion by Mr. Justice Black, were of the view that the case was appropriate for equitable relief and that the state in carrying out its plan for representation in the Congress had fallen under the prohibition of the Fourteenth Amendment. These Justices apparently took the view also that the rights asserted were private personal rights and that the action was not merely in the interest of the State of Illinois. It would hardly be doubted that the opinion of Mr. Justice Black fully sustains the rights of appellants in this case and would authorize the relief they seek. We believe it a fair appraisal of the position taken by Mr. Justice Rutledge in the Colegrove case to say: He rejected the view that Congress was given the final authority in the premises; he conceded that equity had the power to deal with such a situation but was of the opinion that since, if relief were granted and corrective legislation were not provided by the State of Illinois it would entirely lose the right to district representation in Congress, the Court should exercise its discretion and withhold equitable relief. Not because of want of power but because of practical results. There are no such difficulties in the present case. If the statute is plainly unconstitutional and if the rights of plaintiffs which are invaded are substantial, as we believe has been demonstrated, to so adjudicate would not be crossing any forbidden line or entering indelicately into the political department of Georgia's government. In the case of *any* State statute which violates the Federal Constitution, if it becomes necessary for the Federal Courts to so adjudicate, there is some impact upon the government. Either the State legislature must in such case withhold future legislative action or must in future legislation on the subject conform to the Constitution. In the present case, based upon the unconstitutionality of the statute and the rules which it is visiting upon plaintiffs and their representative class, we have asked that the State and party officials charged with the carrying out and consummating its illegal results be enjoined. The last step to be taken in this process and not to be done until January 13, 1947, is the transmission by the Secretary of State to the Georgia General Assembly of the ballots containing the

name of the candidate for Governor illegally nominated and illegally elected. It has been contended by appellees that by seeking to stop the operation of this statute at this stage we are thus in purpose and effect seeking to control the action of the General Assembly because of their duty to declare and publish the results of the election for Governor when the returns are received by them from the Secretary of State. But we do not. What the legislature may do when it finds there were no returns submitted to it, because the only candidate permitted to be on the ballot was placed there by the operation of an illegal statute, is entirely up to the legislature in its own competence to decide. No chaos could result in this case, such as pointed out in the Colegrove case, irrespective of what might later be done. The Constitution of Georgia provides that the present Governor would continue to hold office until his successor is duly elected and qualified.[13]

Of course this case concerns political rights and political action but if it be a right it is nonetheless a right and, we submit, nonetheless valuable on that account. Mr. Justice Black points out in *Colegrove v. Green*, supra, that: "Federal Courts have not hesitated to exercise their equitable power in cases involving deprivation of property and liberty. *Ex Parte Young*, supra; *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423. There is no reason why they should do so where the case involves the right to choose representatives that make laws affecting liberty and property."

Perhaps overworked by repeated quotation, is the celebrated statement of Mr. Justice Holmes in *Nixon v. Herndon*, 273 U.S. 536, 47 S. Ct. 446, 71 L. Ed. 759, "The objection that the subject matter of the suit is political is little more than a play upon words. Of course the petition concerns

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[13] Article V. Section I. Paragraph I. Constitution of the State of Georgia: "Governor; Term of Office; Salary, etc. The executive power shall be vested in a Governor, who shall hold office during the term of four years, and until his successor shall be chosen and qualified . . ."

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political action but it alleges and seeks to recover for private damage and that private damage may be caused by such political action and may be recovered in a suit at law hardly has been doubted for over two hundred years." In the earlier case of *McPherson v. Blacker*, 146 U. S. 1, 13 S. Ct. 3, 36 L. Ed. 869, already referred to, the Court said: "The question of this act as presented to us by this record is a judicial question and we cannot decline to exercise our jurisdiction upon the inadmissible suggestions that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the state, as revised by our own." That case, it will be remembered, dealt with the delicately political subject of the method chosen by a state for the selection of presidential electors and the objection was there, as here, made that only political questions were involved and that the Court had no power to dispose of them. In rejecting that contention this Court said: "But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States and this is a case so arising since the validity of the state law was drawn in question as repugnant to such Constitution and laws and its validity was sustained. *Boyd v. State* 143 U.S. 135, 12 S. Ct. 375." A strong statement of a State Court on the same subject is taken from the case of *Attorney General v. Suffolk County*, supra, as follows: "The right to vote is a fundamental personal and political right. Unlawful interference with the right to vote, whether on the vote of public officials or private persons is a private wrong for which the law affords a remedy although it may also have significant political results. Any act of the legislature limiting or in any way interfering with this right would be invalid. While the right to vote for members of the legislature is in a sense a political right it is also a precious personal right . . . The circumstances that political considerations may be connected with rights affords no justification to Courts for refusal to adjudicate causes rightly pending before them. Such a controversy even though political in many of its aspects is of judicial cognizance." (224 Mass. 598, 113 N.E. 584).

Cooley, Principles of Constitutional Law, p. 263, says: "Suffrage is not of right, but it is granted by the State on a

consideration of what is most for the interest of the State. Nevertheless, the grant makes it a legal right until it is recalled and it is protected by the law as property is . . ."

Mr. Chief Justice Stone in delivering the opinion of this Court in *Snowden v. Hughes*, 321 U.S. 1, cited *McPherson v. Blacker*, supra, *Nixon v. Herndon* and *Nixon v. Condon*, supra, in support of the proposition that "where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." Although in the Snowden case the action was by a candidate himself, a recovery would have been allowed under the equal protection clause, except that instead of attacking a statute violative of the equal protection clause the plaintiff sought relief under the statute and failed to sufficiently show discrimination. We feel fully authorized to urge that the Snowden case alone is ample authority for the position we are here maintaining.

The case of *Giles v. Harris*, 189 U.S. 475, 23 S. Ct. 639, 47 L. Ed. 909, has been relied upon by appellees as authority against the position here taken. We do not find anything in that case which weighs very heavily against the claim of appellants. It is true that the statement is there made that "the traditional limits of proceedings in equity have not embraced a remedy for political wrongs" but that case was decided on the reasoning that quite aside from the question of extending "the traditional limits" of jurisdiction in equity, there was really nothing which as a practical matter equity could do for plaintiffs who had sought to compel their registration as voters for a particular election. It was also believed in that case that to grant relief would amount to policing the elections in Alabama. It was also pointed out that they sought relief under a State Constitutional provision which they attacked as invalid. In any event the ruling in that case was not considered such as to prevent the pronouncement of principles quoted above from *Snowden v. Hughes* nor was it regarded as interfering with the relief granted in the case of *Smiley v. Holm* 285 U.S. 355, 52 S. Ct. 399, 76 L. Ed. 795. The Smiley case is fully discussed in briefs and in the opinion *Colegrove v. Green*, supra, to-

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gether with the two other cases controlled by it *Koenig v. Flynn* 285 U.S. 375, 52 S. Ct. 403, 76 L. Ed. 805, and *Carroll v. Becker, Secretary of State of Missouri,* 285 U.S. 380, 52 S. Ct. 402, 76 L. Ed. 807. In that case as in the present one, suit was brought by a citizen and elector of the state. It was there sought to obtain a judgment declaring invalid filings for nomination for the office of Representative in Congress. Plaintiffs' case was demurred to on the ground, among others, that the asserted inequality presented a political and not a judicial question. The history and result of that case has been too fully considered to require more than mere mention to show that we can come clearly within its ruling. In fact, it is submitted, we present a much stronger case — a statute which on its face plainly and deliberately provides for, aims at and accomplishes gross discrimination against an equal enjoyment by a particular class of the right of franchise. Plaintiffs there sought injunctive relief which had been denied them. This Court by a full bench, with the exception of Mr. Justice Cardozo who took no part in the case, reversed the Lower Court.

In an older case, that of *Boyd v. State of Nebraska, ex rel. Thayer,* 143 U.S. 136, 12 S. Ct. 375, 36 L. Ed. 103, this Court has dealt with a case involving title to the office of Governor of Nebraska. That case originated in the State Court. A Federal question was made by a challenge of Boyd's citizenship involving his alleged failure as an alien to become naturalized. This Court reached the conclusion that Boyd was not disqualified to hold the office of Governor, that is, they decided the question that he was a citizen within the meaning of the Federal Constitution and reversed the Lower Court, although the result was to oust the person holding the office of Governor and to place Boyd in office.

In the case of *Mitchell v. Wright,* 154 Fed. 2nd, 924, petitioner was seeking declaratory judgment and an injunction against an election official as well as damages. The District Court had dismissed his complaint on another ground but the Fifth Circuit Court of Appeals found no difficulty in reversing the case with its approval of the relief sought. The same result was reached in *Hall v. Nagel* 154 Fed. 2nd 931.

Civil rights by the Amendment to the Federal Constitution were, we submit, made fully as important as the rights of persons and property. Yet the State Constitution of Georgia has not expressly incorporated that provision. In its provisions as to the paramount duty of government which shall be "impartial," no rights are included except those of person and property.[14] The right to vote is invaluable. It is the very basis of our form of government that every voter in a given election area should stand on an equal footing. The judicial code of the United States recognizes the non-monetary nature of this right by stating that no monetary "amount involved" need be stated as in other cases.[15] Civil rights cases are in a class by themselves. (1) They do not require a jurisdictional amount. (2) They are not like criminal cases where the defense can be set up at the trial of the indictment. (3) They are not like property cases where values can be expressed in money. They are more like "heirloom" cases in specific performance. (4) Haste is sometimes necessary, as in the instant case, because once the right is lost it cannot be retrieved or adequately redressed. It is an irreparable wrong when once completed. Moreover the provisions of the Fourteenth Amendment are that rights shall be "protected." Protection is something more than allowing the rights to be taken away and then recompense being made therefor. It involves shielding the rights from invasion, not compensating therefor. The nature of the right is such that unless preventative relief is given the right is lost forever. The assurance of a right to vote in the next election will not be the same as protecting that right in the pending action. The wrong in this case is not yet completed, as it would have been if the plaintiffs had offered to deposit a ballot on the 17th day of July and had been refused. That wrong would have been finally consummated when the polls closed. The District Court was not asked to supervise any election or to recount votes or to

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[14] Article I, Sec. I, Par. II, Constitution of Georgia.
"Protection the duty of government. Protection to person and property is the paramount duty of government, and shall be impartial and complete."

[15] Judicial Code, Sec. 24 as amended 28 U.S.C.A., Sec. 41 (1).

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decide an election contest or to decide how the November election should be held. The only question was, and is, should a man who by operation of an unconstitutional statute received the majority of the county unit vote though less than the majority of the individual vote, be submitted to voters in the November election as the Democratic and (only) candidate. The answer to this question is purely one of law. If the county unit statute providing an unequal classification of votes and an unwarranted discrimination against voters in the large counties is unconstitutional, the answer is "No." If the Court reaches the answer "No," injunction should follow as a matter of course to prevent the illegal action from being consummated. In no other way can the illegal result be prevented.

The case of *Bell v. Hood*, ... U.S. ....., 66 S. Ct. 773, advance sheet April 15, 1946, furnishes pertinent statements on the appropriate exercise of equity jurisdiction and we submit that under the principles there stated, plaintiffs find ample basis for relief. The following statements from that case are of special significance: "And it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to *protect* rights safeguarded by the Constitution and to restrain individual state officials from doing what the Fourteenth Amendment forbids the State to do. Moreover, where federally protected rights have been invaded it has been the rule from the beginning that Courts will be alert to adjust the remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded and a Federal statute provides for a general right to sue for such invasion, Federal Courts may use any available remedy to make good the wrong done." (Italics supplied.)

It is argued that this is a practice which has been followed since the passage of the statute in 1917 and apparently it is felt for some unaccountable reason this should provide some immunity from attack. But political peonage cannot be justified merely because it has been long existent. Wrong cannot be made right by long endurance. History lends no sanctity to a practice if that practice be in itself wrong. If

there are two or more legitimate ways to achieve an object of government then long practice of one may commit the people to a point where a group may not be heard to object, but that presupposes a course that is legitimate. If the practice is unlawful or the pretended law purporting to authorize it is unconstitutional, it is no less so after the lapse of time. It could with just as much reason be argued that since it had long been the practice to exclude Negroes from voting under the force of the statute, the Courts would not now disturb so long an established system. As was said by a distinguished Georgia jurist, Mr. Justice Lumpkin, in *James v. City of Blakely*, 143 Georgia 117, 84 S.E. 431, 433 "... an unconstitutional act cannot become a valid law by age. Unconstitutionality is not like minority, a thing which may be out grown in a few years."

The argument, if we are to be candid, always comes back to this: Plaintiffs have the undoubted right to vote on equality with other voters. They have with equal certainty been denied this right by statute. They are entitled to invoke the equal protection of the law. They are doing so. It is no answer to them to say that they may seek their remedy in the Political Department of the government. The very noose they now complain about prevents their securing such a remedy. The General Assembly through whom they would be required to look for relief, composed of a majority from the counties now enjoying the advantage complained about, could hardly be expected to voluntarily forego for themselves this advantage so long enjoyed.

The fact that results may have political implications affords no reason to deny relief if the parties are plainly entitled to it under the law. We are not asking a sedative, we are asking a cure. The fact that the remedy may be painful may be unfortunate but as pointed out by Mr. Justice Black in *Colegrove v. Green* it has the virtue that "it is constitutional." Every judicial landmark in the great unfolding history of the Courts has produced more than a ripple on the calm waters of an easy going, long suffering people. Only the judicial armor can give ample shield against these wrongs.

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VIII.

The District Court as constituted had the power and duty to declare the Act complained of unconstitutional whether or not Plaintiffs-Appellants were entitled to injunctive relief.

If, as we believe it has been demonstrated, the statute under attack violates the Constitution as claimed, it would seem also that plaintiffs had thus shown themselves entitled to relief from its consequences by the grant of injunction. Reluctant as we may be to leave the contention that injunction should as a matter of course follow the judicial death of the statute, it is nevertheless with equal earnestness urged that if the Court should determine, in the delicate handling of its own power, that injunction in the particular case should not be granted, the District Court should nevertheless have declared, and we submit this Court should now declare, the act unconstitutional. The District Court by its judgment and specifically in its conclusions of law held the statute to be valid. A dismissal or affirmance of this case would in effect sustain the constitutionality of the county unit law and thus furnish precedent and establish the basis of future discrimination in states in which the State Constitution omits an equal protection clause or where otherwise with such a ruling as authority, the same might be accomplished. In the terms of the Federal Declaratory Judgment Act Judicial Code, Sec. 274d, U.S.C.A. 28, Section 400, an actual controversy unquestionably existed. A judgment under the statute is authorized "whether or not further relief is or could be prayed." The further relief (in this case a decree enjoining defendants as prayed) may be granted whenever necessary or proper. It is not essential, however, to support or to authorize declaratory judgment that the further relief be actually approved or granted. This Court in dealing with an action brought under the Uniform Declaratory Judgment Act of Tennessee in the case of *N.C. & St.L. R.R. v. Wallace* 288 U.S. 249, 53 S. Ct. 345, 77 L. Ed. 730, held that "prayer for injunctive relief is not a necessary prerequisite of the judicial power, allegations of threatened irreparable injury, which are material only if an injunction is asked, may like-

wise be dispensed with if, in other respects, the controversy presented is . . . real and substantial" and Mr. Justice Stone in division 3 of the opinion in that case stated: "While the ordinary course of judicial procedure results in a judgment requiring an award of process or execution, such relief is not an indispensable adjunct to the exercise of the judicial function, *Fidelity National Bank and Trust Company v. Swope* 274 U.S. 132, 47 S. Ct. Rep. 511, 71 L. Ed. 959. This Court has often exerted its judicial power to adjudicate boundaries between states although it gave no injunctive relief upon the determination of the legal rights which were the subject of controversy between the parties."

Again in the case of *Great Lakes Dredge & Dock Company v. Huffman* 319 U.S. 293, 63 S. Ct. 1070, 87 L. Ed. 1407, it was recognized that declaratory relief might be granted though injunctive relief denied, although dismissal of that case was affirmed because the parties, it was held, had adequate remedy under State laws. In *State of Texas v. State of Florida*, 306 U.S. 398, 59 S. Ct. 563, 83 L. Ed. 817, this Court approved declaratory judgment, although for reasons of policy, the power which the Court possessed to grant an injunction was not exercised and it was said in effect that the failure to exercise this function did not deprive the case of its character as a "case" or "controversy" cognizable by the Court.

There is much to be said for the application of that principle in this case if the Court were not to approve the grant of injunctive relief in spite of finding that the act was unconstitutional. There is no other way except by the kind of proceeding which plaintiffs adopted by which their rights could be tested or the statute appropriately challenged. They chose a tangible case where there was an actual controversy. They could not bring an action except at a time when their rights were being impaired. They could not simply pick out a good season of the year and file suit to have an abstract declaration made that the law was invalid. If they had brought the action before the primary, they would have been met with the claim that it was premature for the reason, among others, that they could not anticipate the harm or injustice which would result to them since the primary

could not be predicted. They could not wait until after the returns from the election had been filed and its results consummated. Therefore, they chose the only time and seized upon the only actual controversy where the question could properly be made. There was and is a judicial controversy. If their contention is sustained that the statute is invalid it prevents them from being forever foreclosed by an affirmance of a judgment, or its equivalent upon the order of dismissal having the same effect, which held the act constitutional. To leave the parties so situated would, we submit, amount to judicial sanction of admitted wrong. Such is not the high calling of equity.

IX.

Plaintiffs-Appellants have no adequate remedy at law by an action for damages or otherwise.

The above statement would hardly seem to need support in view of argument already presented on other phases of the question. The man of color when denied the right to deposit his ballot in the box may sue for damages. So might these plaintiffs if they had been thus denied, but since they are accorded the doubtful privilege of presenting and having accepted their ballot which then must go through a process of dilution, there is obviously no appropriate action at law which would afford relief. The wrong to them is not yet completed. We seek to arrest it before this is done, after which their question would become moot.

X.

Plaintiffs-Appellants are not estopped by their participation in the Primary Election.

While no express adjudication on the subject was made by the Lower Court, it was urged by the defendants in their answer that the plaintiffs by their participation in the primary in casting their ballot with knowledge of the provision of the statute and the party rules were estopped to claim relief from its consequences. Their situation is different from one where private parties litigate with each other and where familiar principles of estoppel may govern in reference to their conduct.

Quaker City Cab Co. v. Commonwealth of Pennsylvania 277 U.S. 389, 48 S. Ct. 553, 72 L. Ed. 927

James v. City of Blakely, 143 Ga. 117, 124 (84 S.E. 413)

Sellers v. Cox 127 Ga. 246 (2) (56 S.E. 284)

XI.

The present action insofar as it relates to the Secretary of State is not a "suit against the State."

Under a provision of the State Constitution[16] the Secretary of State, after the holding of the election is required to hold the ballots showing the result of voting and to trans-

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[16] Article V, Sec. I, Par. III of the Constitution of Georgia provides: "Returns of elections. The returns for every election of Governor shall be sealed up by the managers, separately from other returns, and directed to the President of the Senate and Speaker of the House of Representatives, and transmitted to the Secretary of State, who shall, without opening said returns, cause the same to be laid before the Senate on the day after the two houses shall have been organized, and they shall be transmitted by the Senate to the House of Representatives." Par. IV. provides: "How returns published. The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; but, if no person shall have such a majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice.

mit them to the President of the Senate when the General Assembly convenes (next on January 13, 1947). This, of course, contemplates a lawful election with the name of the lawful candidate or nominee on the ballot. Therefore, since after the filing of the plaintiffs' petition and before the hearing by the three-judge Court, the time had expired by law for the name of any other candidate to be placed on the election ballots. Plaintiffs prayed for injunction against the Secretary of State to prevent him from transmitting the returns showing the name of a candidate so illegally nominated and chosen. Since such candidate was illegally nominated and since his name and his name only was placed on the ballot, already by virtue of this nomination there is no duty, as there normally would be, on the Secretary of State to take such action. Had the unconstitutional statute been ignored as it should have been, there was no candidate nominated and if the Secretary of State should perform the act of transmitting the returns of the election it would amount to no more than a consummation of the illegal process begun under the discriminatory statute. This relief against the Secretary of State was incidental to the main relief prayed for, to-wit, relief against the statute which abridged the plaintiffs' right to vote. There was no affirmative relief or recovery sought against the State. Two citizens for themselves and others in their class simply invoked the protection of the United States Constitution against the provisions of an act of its General Assembly; the wrong to them is not yet complete, it is still in progress; they seek to stop it before its consummation.

Where State officials purporting to act under State authority invade rights secured by the Federal Constitution, they are subject to the process of the Federal Courts in order that the persons injured may have appropriate relief. In such a case the suit is not against the State within the meaning of the State's immunity from suit.

Sterling v. Constantin, 287 U.S. 378, 53 S. Ct. 190, 193, 77 L. Ed. 375;

Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 442 449, 450, 451, 52 L. Ed. 714;

Smyth v. Ames, 169 U.S. 466, 18 S. Ct. 418, 42 L. Ed. 819.

Although a state may not be sued without its consent, nevertheless a state officer acting under color of his official authority may be enjoined from carrying into effect a State law asserted to be repugnant to the Constitution of the United States, even though such injunction may cause the state law to remain inoperative until the constitutional question is judicially determined.

Public Service Co. vs. Corboy, 250 U.S. 153, 39 S. Ct. 440, 63 Law Ed. 905.

From *Ex parte Young*, supra, at page 453, the following statement is authority for the position that the Secretary of State may be enjoined, even though the particular duty to be performed is imposed by the provision of some other act (in this case by the Constitutional provision shown in footnote No. 16, supra):

"In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party."

"It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases, it is true, the duty of enforcement has been so imposed (154 U.S. 362, 366, par. 19 of the Act) but that may possibly make the duty more clear; if it otherwise exists it is equally efficacious. The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is especially created by the act itself, is not material so long as it exists."

XII.

It is not too late to grant effective relief nor would it be an improper exercise of this Court's power to do so.

It is not too late for plaintiffs yet to be accorded effective relief by injunction. The only name for candidate for Governor which does or could under the unconstitutional statute appear on the General Election ballot is one which could not have appeared if the votes of plaintiffs and others in their class had been given the same weight or approximately the same weight as that of other voters. It is this gross discrimination and it only which resulted in this candidate being on the ballot and which resulted by operation of the statute in excluding others. While a primary election does not finally select the one to be Governor, it does in fact with certainty exclude from the possibility of being Governor all the members of the party holding the primary except one.

To enjoin the Secretary of State from taking this last administrative step, that is to prevent his transmission of the ballot, is not to supervise or police an election nor to impose an elective system upon the state nor to stop or interfere with any formal functioning of governmental agencies. It merely arrests a proceeding because when tested it has been condemned as violative of a provision of the United States Constitution.

The action of the Secretary of State, as one step in an election process, of transmitting votes to the State Senate is but the apex of a pyramid, of which the base was the nomination of a candidate by a primary election. If the primary election did not, in fact, result in the nomination of any one, because no one got a majority of the votes cast, then there is no base on which to construct the pyramid and the apex falls for lack of support.

Such an injunction need impose no controls, vest no supervision. The State is left utterly free so long as it does not violate the Federal Constitution. Its own organic laws provide for succession in office and no new legislation would be made mandatory by the grant of relief as prayed for. In this connection it should also be borne in mind, as already urged, that unless plaintiffs are granted the relief in this proceeding, they are entirely without remedy.

There may be delicacies and concern over the unfortunate necessity of taking judicial action in a Federal Court so

directly affecting a process which we normally think of as a State function but the same may as easily be said of many cases and we know of no higher judicial function than to preserve constitutional rights and liberties of the people. Again we say political peonage cannot be justified either by the lapse of time or further niceties of "jurisdictional fencing."

CONCLUSION

The use of further argument in concluding this brief could but add up to the following:

The Right:

Every registered elector in Georgia is entitled to vote.

The Discrimination:

A statute designed to reduce to practical ineffectiveness the votes of electors in the more populous counties.

The Grossness of Discrimination:

The vote of an elector in Fulton County has only 1/106 of the effectiveness of one in Chattahoochee County. The practical disenfranchisement of racial, religious, and industrial minorities in the metropolitan areas.

The Certainty of Application:

The particular election has been held, the results tabulated and is being consummated according to the discriminatory statute, which a three-judge Court has pronounced valid.

The Partial Remedy:

The Supreme Court to declare the statute invalid. This will at least limit the continuation of the wrong to the present term.

The Only Complete Remedy:

The Supreme Court to approve injunction.

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Respectfully submitted,

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APPENDIX

Exhibit 1: County outline Map of Georgia.

Exhibit 2: Georgia Gubernatorial Primary of July 17, 1946: Population per unit vote, for each county.

Exhibit 3: Georgia Gubernatorial Primary of July 17, 1946: Popular votes per unit vote, for each county.

Exhibit 4: Georgia Gubernatorial Primary of July 17, 1946: How the County Unit System Devalues certain votes. One Vote in Chattahoochee County was worth 106 votes in Fulton County.

Exhibit 5: Georgia Gubernatorial Primary of July 17, 1946: Percentage of Population and Unit Votes received by each candidate.

Exhibit 6: Georgia Gubernatorial Primaries of 1932 and 1942: Minimum popular votes required to win.

Exhibit 7: Georgia Gubernatorial Primaries of 1932-1942: Summaries of Returns.

EXHIBIT 1.

COUNTY OUTLINE MAP OF GEORGIA

Note: Under the county unit system, Georgia's 8 most populous counties have 6 unit votes each; the 30 next most populous, 4 unit votes each; and the remaining 121, 2 unit votes each. Total: 159 counties with 410 unit votes.

Source: Citizen's Fact-Finding Movement of Georgia, *Georgia Facts in Figures* (Athens: University of Georgia Press, 1946).

No. 531. COOK *v.* FORTSON, SECRETARY OF STATE, ET AL.; and

No. 532. TURMAN ET AL. *v.* DUCKWORTH, CHAIRMAN OF THE GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE, ET AL. Appeals from the District Court of the United States for the Northern District of Georgia. October 28, 1946. *Per Curiam:* The appeals are dismissed and the District Court is directed to dismiss the bill in each case. See *United States* v. *Anchor Coal Co.*, 279 U. S. 812. MR. JUSTICE BLACK and MR. JUSTICE MURPHY are of the opinion that probable jurisdiction should be noted. MR. JUSTICE RUTLEDGE is of the opinion that the question of jurisdiction should be postponed to the hearing of the cases on the merits and has set forth his views in an opinion (*infra*) which he has filed. *Alex. W. Smith* and *Croom Partridge* for appellant in No. 531. *Charles S. Reid, W. D. Thomson, Marshall L. Allison* and *John L. Tye* for appellants in No. 532. *Eugene Cook*, Attorney General of Georgia, *Victor Davidson, C. E. Gregory, Jr.*, Assistant Attorneys General, *John A. Dunaway, Walter McElreath, Samuel D. Hewlett* and *B. D. Murphy* for appellees. Reported below: 68 F. Supp. 624, 744.

MR. JUSTICE RUTLEDGE.

These appeals seek to invalidate Georgia's county unit system for selecting candidates for election to public office. No. 531 relates to the office of Representative in Congress, No. 532 to that of Governor. In each instance the basic substantive claim is that the system operates to deprive the appellants and other voters of the equal protection of the laws in respect to their rights of suffrage, contrary to

the provisions of the Fourteenth Amendment. Presented also are important questions of jurisdiction and of discretion in exercising it.[1] Both declaratory relief and injunctive relief in various forms were sought.

The District Court in each case denied applications for interlocutory injunctions. At the same time it formally declined to pass finally upon motions to dismiss the causes, although stating "We consider them, however, on the general question of the grant of interlocutory relief."[2] The court then went on to deny the applications upon grounds which, if sustained, would conclude the entire controversy in each case in all but formal entry of an order for dismissal.[3] The principal ground of decision in both cases was reliance upon *Colegrove* v. *Green*, 328 U. S. 549, decided June 10, 1946, rehearing denied this day, 329 U. S. 825, as precluding equitable relief. In No. 532 it was said this was required "whether it be that the subject matter is not of equitable cognizance, or merely that equity should withhold its hand."

In each case, however, the court refused to rest on this ground alone. In No. 531 it went on to rule, apparently, that the county unit system is imposed by party action, not by state action; and that the system was not being

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[1] The jurisdiction of this Court is invoked under §§ 238 and 266 of the Judicial Code as amended, 28 U. S. C. §§ 345, 380. In No. 532 it is not questioned that the attack is upon the validity of a state statute. In No. 531 one ground of appellee's motion to dismiss the appeal is that the appellant's suit attacks, not a state statute, but the rules and action of a political party. Cf. *Ex parte Collins*, 277 U. S. 565, 569.

The two decisions were rendered by three-judge District Courts, constituted identically, pursuant to § 266 of the Judicial Code.

[2] The quoted language is from the opinion in No. 532. A similar statement appears in the opinion in No. 531.

[3] In view of this fact an affirmance of the judgments here would preclude the District Court from taking any other action than to dismiss the causes, upon their being remanded to it.

applied in fact, since the state executive committee prior to the decisions had certified both candidates, subject to later action by the party's state convention. In No. 532 "in order that all questions may be ripe for consideration in the Appellate Court, if necessary," the opinion further stated that "on the ultimate merits we do not think the State of Georgia has been shown to have deprived the plaintiffs of the equal protection of the laws." The decisions come here therefore not only as somewhat dubious rulings upon strictly jurisdictional matters but as decisive and conclusive adjudications upon the merits.

It may be that the orders now in appeal have become moot in part because actions in execution of the challenged Georgia laws which appellants sought to have restrained have now taken place.[4] But in No. 532 in one respect at least injunctive relief prayed for still could be given, if appellants should be found, on hearing, entitled to have it.[5] And in each case declaratory relief, appropriate in many instances where aid by way of injunction cannot be afforded,[6] is sought.

Obviously the appeals present questions related closely to the issues in *Colegrove* v. *Green*, but in my opinion not

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[4] Thus, in No. 532, party officials have certified the results of the primary elections to the Secretary of State and he in turn has sent out the forms for ballots to county ordinaries on the basis of those certifications. The applications sought to restrain these acts.

[5] By amendment, to avoid the effect of the actions taken as set forth in note 4, appellant sought to restrain the Secretary of State from certifying the returns from the general election to the General Assembly.

[6] It was to avoid the limitations resulting from the fact that injunctive or other immediately effective equitable relief could not be given that relief by way of declaratory judgment was authorized by Congress. This Court has not yet determined that declaratory relief cannot be given beyond the boundaries fixed by the preexisting jurisdiction in equity, compare *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 262, with *Giles* v. *Harris*, 189 U. S. 475, 486, although three

necessarily determined by that decision. A majority of the justices participating refused to find that there was a want of jurisdiction, but at the same time a majority, differently composed, concluded that the relief sought should be denied.[7] I was of the opinion that, in the particular circumstances, this should be done as a matter of discretion, for the reasons stated in a concurring opinion. 328 U. S. 549, 564. Those reasons would be pertinent to a consideration of the present appeals, though not necessarily controlling in relation to the somewhat different facts and issues they involve.[8] The issues, whether of jurisdiction, of discretion in exercising it,[9] or of substantive right, are obviously important. In my judgment they have not been conclusively adjudicated by prior decisions of this Court. I therefore think they should not be determined without full hearing and consideration after argument here, more especially in view of the breadth and character of the rulings made in the District Court's decisions. Accordingly I think we should postpone determination of any jurisdictional issues until consideration of the merits and place the appeals upon the calendar for argument. I also think that if these appeals were to be so

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members of the Court announced their view apparently to that effect in *Colegrove* v. *Green*, 328 U. S. 549, 551–552. The outer boundaries of jurisdiction under the declaratory procedure remain largely undetermined. Cf. Judicial Code § 274d, 28 U. S. C. § 400; Borchard, Declaratory Judgments (2d ed. 1941) 365–367, 766–788, 868–874.

[7] Three of the justices so ruling thought the relief should be denied for want of jurisdiction. 328 U. S. 549, 550, opinion of MR. JUSTICE FRANKFURTER.

[8] The discretionary exercise or nonexercise of equitable or declaratory judgment jurisdiction, see *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 300; *Di Giovanni* v. *Camden Fire Ins. Assn.*, 296 U. S. 64, 70, in one case is not precedent in another case where the facts differ. *Hale* v. *Allinson*, 188 U. S. 56, 77–78, quoted in *Di Giovanni* v. *Camden Fire Ins. Assn.*, *supra*, at 71.

[9] See note 3.

treated, the petition for rehearing which has been filed in *Colegrove* v. *Green* should be granted and that case should be set for argument with them.